

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,)
) CR-18-00258-EJD
 PLAINTIFF,)
) SAN JOSE, CALIFORNIA
 VS.)
) MAY 6, 2021
 ELIZABETH A. HOLMES,)
) PAGES 1 - 161
 DEFENDANT.)
) **SEALED PAGES 152 - 161**
)
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE
BY: JOHN C. BOSTIC
JEFFREY B. SCHENK
150 ALMADEN BOULEVARD, SUITE 900
SAN JOSE, CALIFORNIA 95113

BY: ROBERT S. LEACH
KELLY VOLKAR
1301 CLAY STREET, SUITE 340S
OAKLAND, CALIFORNIA 94612

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTERS:

IRENE L. RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074
LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

A P P E A R A N C E S: (CONT'D)

FOR DEFENDANT HOLMES: WILLIAMS & CONNOLLY LLP
BY: KEVIN M. DOWNEY
LANCE A. WADE
PATRICK LOOBY
KATHERINE TREFZ
AMY SAHARIA
ANDREW LEMENS
J.R. FLEURMONT
SEEMA ROPER
725 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20005

1 SAN JOSE, CALIFORNIA

MAY 6, 2021

12:52PM 2 P R O C E E D I N G S

12:52PM 3 (COURT CONVENED AT 1:03 P.M.)

01:04PM 4 THE COURT: LET'S GO ON THE RECORD IN 18-258,
01:04PM 5 UNITED STATES VERSUS ELIZABETH HOLMES.

01:04PM 6 I SEE ALL COUNSEL PRESENT AGAIN. GOOD AFTERNOON.
01:04PM 7 MS. HOLMES IS PRESENT. AND WE'RE READY TO FINISH OUR
01:04PM 8 DISCUSSION, OR CONTINUE OUR DISCUSSIONS I SHOULD SAY, ON THE
01:04PM 9 PENDING IN LIMINE MOTIONS.

01:04PM 10 WHAT I'D LIKE TO DO, MS. SAHARIA, I'D LIKE TO GIVE
01:04PM 11 IN LIMINE MOTION, GOVERNMENT'S NUMBER 9 ONE MORE TRY.

01:04PM 12 MS. SAHARIA: YES. I WOULD AS WELL, YOUR HONOR.

01:04PM 13 THE COURT: LET'S CALL THIS OUT OF ORDER. THIS IS
01:04PM 14 GOVERNMENT'S MOTION NUMBER 9 TO EXCLUDE SELF-SERVING HEARSAY
01:04PM 15 STATEMENTS MADE AND OFFERED BY THE DEFENDANT.

01:05PM 16 YESTERDAY I WAS TALKING ABOUT RECOGNIZING THAT THE ORTEGA
01:05PM 17 CASE, 203 FED. 3D CONTROLS THIS ISSUE AND THAT THE COURT WOULD
01:05PM 18 BE INCLINED TO FOLLOW NINTH CIRCUIT LAW ON THIS ISSUE.

01:05PM 19 I THINK YOU WERE TALKING ABOUT, WELL, THERE MAY BE OTHER
01:05PM 20 CIRCUMSTANCES WHERE OTHER STATEMENTS OF THE DEFENDANT MIGHT,
01:05PM 21 MIGHT BE ADMISSIBLE.

01:05PM 22 I THINK YOUR CONCERN WAS THAT THE COURT WOULD ISSUE A
01:05PM 23 RULING, A BLANKET RULING PROHIBITING YOU FROM EVEN ATTEMPTING
01:05PM 24 TO GET THOSE TYPES OF STATEMENTS IN.

01:05PM 25 MS. SAHARIA: THAT'S RIGHT.

01:05PM 1 THE COURT: IF THAT WAS -- YOU CAN COME TO THE
01:05PM 2 LECTERN IF YOU WOULD LIKE. THANK YOU.

01:05PM 3 AND IF THAT WAS THE IMPRESSION THAT I LEFT YOU WITH, THAT
01:05PM 4 WAS MY MISTAKE. I DID NOT MEAN TO INDICATE THAT.

01:05PM 5 I THINK IT IS -- I DON'T KNOW WHOSE MOTION THIS IS.

01:05PM 6 YES. THANK YOU. MS. VOLKAR, COME ON UP.

01:05PM 7 MS. VOLKAR: THANK YOU, YOUR HONOR.

01:05PM 8 THE COURT: I DIDN'T MEAN TO INDICATE THAT I WAS
01:05PM 9 GOING TO GRANT THE MOTION AND THEREBY PRECLUDE YOUR TEAM FROM
01:06PM 10 INTRODUCING OR AT LEAST ATTEMPTING TO INTRODUCE STATEMENTS THAT
01:06PM 11 YOU FELT COULD BE ADMISSIBLE FOR SOME OTHER PURPOSE OTHER THAN
01:06PM 12 WHAT ORTEGA AND THE PROGENY.

01:06PM 13 MS. SAHARIA: THAT WAS MY CONCERN, YOUR HONOR. I'M
01:06PM 14 PREPARED TO ADDRESS THAT IF HELPFUL, BUT I THINK WE AGREE WITH
01:06PM 15 YOUR HONOR THAT ORTEGA IMPLEMENTS RULE 801 WHICH PROHIBITS US
01:06PM 16 FROM INTRODUCING MS. HOLMES'S STATEMENTS IF THEY ARE HEARSAY.
01:06PM 17 AND THE HOLDING OF ORTEGA WAS, QUOTE, "THE DISTRICT COURT DID
01:06PM 18 NOT ABUSE ITS DISCRETION WHEN IT LIMITED ORTEGA'S ABILITY TO
01:06PM 19 ELICIT HIS EXCULPATORY HEARSAY STATEMENTS ON
01:06PM 20 CROSS-EXAMINATION."

01:06PM 21 THERE ARE MULTIPLE DECISIONS OF THIS COURT THAT THEN GO ON
01:06PM 22 TO EXPLAIN THAT THERE MAY BE CIRCUMSTANCES IN WHICH A
01:06PM 23 DEFENDANT'S OUT-OF-COURT STATEMENT IS ADMISSIBLE FOR SOME OTHER
01:06PM 24 NONHEARSAY PURPOSE, FOR INSTANCE, THE YAGI CASE BY JUDGE CHEN
01:06PM 25 AND THE YANG CASE BY JUDGE KOH.

01:06PM 1 SO WE WOULD JUST -- OF COURSE, WE INTEND TO COMPLY WITH
01:07PM 2 ORTEGA. WE WILL NOT INTRODUCE MS. HOLMES'S STATEMENTS FOR THE
01:07PM 3 TRUTH, BUT THERE MAY BE OTHER PURPOSES SUCH AS STATE OF MIND OR
01:07PM 4 OTHER NONHEARSAY PURPOSES TO WHICH THEY COULD BE ADMISSIBLE.

01:07PM 5 THAT'S ALL THAT I WAS INTENDING, PERHAPS INARTICULATELY,
01:07PM 6 TO EXPLAIN.

01:07PM 7 THE COURT: NO, NO. AND I DIDN'T MEAN TO SUGGEST
01:07PM 8 THAT THERE WOULD BE A BLANKET PRECLUSION FROM EVEN THAT
01:07PM 9 ATTEMPT.

01:07PM 10 DO YOU WISH TO BE HEARD?

01:07PM 11 MS. VOLKAR: I WOULD, YOUR HONOR.

01:07PM 12 THIS IS, AS YOU MENTIONED YESTERDAY, A STRAIGHTFORWARD
01:07PM 13 APPLICATION OF ORTEGA, AND IF THE COURT WISHES TO LOOK TO WHAT
01:07PM 14 THE GOVERNMENT IS SEEKING, IF THE COURT WOULD LOOK -- IF THE
01:07PM 15 GOVERNMENT WOULD POINT THE COURT TO A RECENT DECISION IN THIS
01:07PM 16 COURT BY JUDGE ILLSTON IN THE DASHNER CASE FROM JUST A FEW
01:07PM 17 YEARS AGO.

01:07PM 18 THE REASON WHY WE POINT TO THAT IS BECAUSE THERE ARE A LOT
01:07PM 19 OF STATEMENTS IN THIS CASE BY THE DEFENDANT TO THE MEDIA
01:07PM 20 THROUGHOUT THE LAST SEVERAL YEARS AND THAT THE DEFENDANT COULD
01:07PM 21 USE, FOR EXAMPLE, ON CROSS-EXAMINATION OF GOVERNMENT WITNESSES
01:07PM 22 OR NOT THROUGH THE DEFENDANT'S OWN TESTIMONY THAT WOULD
01:08PM 23 ESSENTIALLY, AS THE ORTEGA CASE SAYS, BE A BACKDOOR BRINGING IN
01:08PM 24 THE SELF-SERVING AND STATEMENTS ABOUT SORT OF ALTRUISTIC MOTIVE
01:08PM 25 BEHIND THE COMPANY WITHOUT ALLOWING THE GOVERNMENT THE CHANCE

01:08PM 1 FOR CROSS-EXAMINATION.

01:08PM 2 AND, OF COURSE, A DEFENDANT HAS THE RIGHT TO TESTIFY.
01:08PM 3 THAT IS HER RIGHT. BUT IF SHE CHOOSES NOT TO TESTIFY, THEN THE
01:08PM 4 GOVERNMENT WOULD BE LEFT WITHOUT RECOURSE TO CHALLENGE OR TO
01:08PM 5 VET THESE STATEMENTS, AND THAT IS THE GOVERNMENT'S ULTIMATE
01:08PM 6 CONCERNS. AND JUDGE ILLSTON SAW THAT IN THE DASHNER CASE.

01:08PM 7 I WOULD ALSO LIKE TO SPECIFICALLY RESPOND TO YANG AND
01:08PM 8 YAGI. THE YANG CASE WAS BEFORE JUDGE KOH IN THIS DISTRICT, AND
01:08PM 9 THERE THE DEFENDANT SPECIFICALLY STATED THAT THEY WOULD NOT BE
01:08PM 10 INTRODUCING ANY HEARSAY STATEMENTS OF THE DEFENDANT.

01:08PM 11 WE HAVE NOT RECEIVED A SIMILAR STATEMENT IN THIS CASE SO I
01:08PM 12 BELIEVE THAT DISTINGUISHES YANG FROM THE FACTS BEFORE THE
01:08PM 13 COURT.

01:08PM 14 AND THE YAGI CASE FOCUSSED MOSTLY ON THE STATE OF MIND
01:09PM 15 EXCEPTION, WHICH AT LEAST IN THE DEFENDANT'S OPPOSITION HAS NOT
01:09PM 16 SPECIFICALLY BEEN RAISED, ALTHOUGH I BELIEVE MS. SAHARIA
01:09PM 17 REFERENCED IT YESTERDAY.

01:09PM 18 I WOULD POINT AGAIN TO JUDGE ILLSTON'S DECISION IN
01:09PM 19 DASHNER, WHICH POINTS TO A NINTH CIRCUIT CASE, COLLICOTT FROM
01:09PM 20 2013, THAT REALLY TALKS ABOUT HOW LIMITED THE STATE OF MIND
01:09PM 21 EXCEPTION IS, AND IT TALKS ABOUT THE FACT THAT IF YOU'RE TRYING
01:09PM 22 TO BRING IN HEARSAY STATEMENTS THROUGH ANOTHER WITNESS
01:09PM 23 TESTIFYING, IT IS OFTEN INADMISSIBLE UNDER THIS BASIC BLANKET
01:09PM 24 BLACK LETTER LAW RULE, AND IF IT'S SORT OF A MEMORY OR BELIEF
01:09PM 25 OF WHAT THE DEFENDANT SAID COMING IN THROUGH ANOTHER WITNESS,

01:09PM 1 THEN IT'S IRRELEVANT HEARSAY.

01:09PM 2 AGAIN, I THINK I WOULD POINT TO ALTHOUGH THERE ARE THESE
01:09PM 3 TWO DISTRICT COURT CASES OUT THERE, THEY REALLY HAVE LIMITED
01:09PM 4 APPLICATION AND THE NINTH CIRCUIT IS VERY CLEAR. WE'RE JUST
01:09PM 5 LOOKING FOR A RULE AGAIN IN YOUR ORDER SIMILAR TO WHAT
01:09PM 6 JUDGE ILLSTON DID, WHICH IS JUST REMINDING OF THOSE GUARDRAILS
01:10PM 7 AS WE HEAD INTO TRIAL.

01:10PM 8 THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

01:10PM 9 I THINK OUR CONVERSATION HAS REMINDED US OF THE
01:10PM 10 GUARDRAILS, AND I'M NOT CERTAIN I NEED TO MAKE A SPECIFIC
01:10PM 11 MOTION. I HAVE NOT HEARD MS. SAHARIA ADVANCE A STATEMENT THAT
01:10PM 12 SHE THINKS IS APPROPRIATE NOW. WE HAVEN'T STARTED TRIAL YET.

01:10PM 13 MS. SAHARIA: CORRECT. WE DON'T EVEN KNOW WHAT
01:10PM 14 STATEMENTS THEY'RE ATTEMPTING TO EXCLUDE BECAUSE THEY HAVE NOT
01:10PM 15 IDENTIFIED THEM WHICH IS WHY THE COURT IN YAGI AND YANG
01:10PM 16 DEFERRED RULING ON THE MOTION.

01:10PM 17 THE COURT: AND I THINK WE KNOW TRIALS ARE VERY
01:10PM 18 FLUID, THEY CHANGE, THINGS CAN HAPPEN, AND I THINK IT WOULD BE
01:10PM 19 PREMATURE FOR THE COURT TO MAKE ANY KIND OF A RULING NOW BASED
01:10PM 20 ON WHAT WE KNOW THE LAW IS, BUT I DON'T HAVE THE TEXTUAL
01:10PM 21 INFORMATION IN FRONT OF ME TO ACTUALLY RULE ON A MOTION, DO I?
01:10PM 22 OTHER THAN TO RECOGNIZE AND BE GRATEFUL THAT EVERYBODY
01:10PM 23 RECOGNIZES WHAT THE LAW IS IN THE CIRCUIT AND THE STATEMENT
01:10PM 24 THAT THE COURT INTENDS TO FOLLOW AND I WILL NOTE THAT ALL
01:10PM 25 COUNSEL DO AS WELL.

01:10PM 1 MS. SAHARIA: I AGREE, YOUR HONOR.

01:10PM 2 THE COURT: ALL RIGHT. THANK YOU.

01:10PM 3 MS. VOLKAR: THANK YOU.

01:10PM 4 THE COURT: I'LL DEFER THE MOTION. THANK YOU.

01:11PM 5 ALL RIGHT. LET'S TURN OUR ATTENTION BACK TO THE FIRST

01:11PM 6 MOTION THAT THE PARTIES HAVE INDICATED THAT THEY WOULD LIKE TO

01:11PM 7 DISCUSS.

01:11PM 8 IT'S DOCKET 567, AND THIS IS MS. HOLMES'S MOTION TO

01:11PM 9 EXCLUDE EVIDENCE CONCERNING WEALTH, SPENDING, AND LIFESTYLE.

01:11PM 10 MR. DOWNEY: GOOD AFTERNOON, YOUR HONOR.

01:11PM 11 THE COURT: GOOD AFTERNOON, MR. DOWNEY.

01:11PM 12 MR. DOWNEY: KEVIN DOWNEY FOR MS. HOLMES.

01:12PM 13 AS THE COURT NOTED, I'LL BE ADDRESSING THE MOTION IN

01:12PM 14 LIMINE THAT RELATES TO WEALTH, WHICH IS AT DOCKET 567.

01:12PM 15 I MAY ALSO REFER DURING THE COURSE OF THE ARGUMENT TO WHAT

01:12PM 16 WE CALL THE SAHARIA AFFIDAVIT, WHICH IS TEXT IN THE DOCKET AS

01:12PM 17 579 AND PRINCIPALLY ANY REFERENCE I MAKE WOULD BE TO EXHIBIT 3

01:12PM 18 OF THAT DOCUMENT.

01:12PM 19 OF COURSE, I'M ALWAYS HAPPY TO HEAR WHATEVER THOUGHTS THE

01:12PM 20 COURT HAS AS TO THE ISSUES THAT HAVE DRAWN ITS FOCUS IN

01:12PM 21 REVIEWING THE BRIEFS.

01:12PM 22 BUT I THOUGHT THAT WHAT MIGHT BE HELPFUL FOR THE COURT AND

01:12PM 23 PROBABLY MOST HELPFUL WOULD BE TO FOCUS ON WHAT I THINK ARE THE

01:12PM 24 BINDING NINTH CIRCUIT CASES TO TALK ABOUT THE EVIDENCE THAT WE

01:12PM 25 KNOW SURELY WILL COME IN DURING THE COURSE OF THE TRIAL, THE

01:12PM 1 EVIDENCE THAT MOST CERTAINLY SHOULD NOT COME IN DURING THE
01:12PM 2 TRIAL. AND ALSO, YOUR HONOR, I'D LIKE TO SAY IN THE LAST
01:13PM 3 PORTION OF MY COMMENTS, I WOULD LIKE TO TALK ABOUT WHAT COULD
01:13PM 4 BE COMMENTED ON DURING OPENING, AND I THINK IT'S A LITTLE
01:13PM 5 PREMATURE TO TALK ABOUT WHAT WILL BE SAID IN CLOSING, BUT MUCH
01:13PM 6 OF WHAT I WOULD SAY WOULD APPLY THERE AS WELL.

01:13PM 7 SO LET ME TALK ABOUT THE EVIDENCE FIRST THAT WILL COME IN
01:13PM 8 IN LIGHT OF REYES AND MITCHELL. I THINK I SHOULD SAY FOR THE
01:13PM 9 COURT REPORTER THAT THE REYES CASE IS R-E-Y-E-S.

01:13PM 10 I KNOW THE COURT IS VERY FAMILIAR WITH THE FACTS OF THOSE
01:13PM 11 CASES, BUT I THOUGHT IT MIGHT BE USEFUL TO ENGAGE IN SOME
01:13PM 12 DISCUSSION OF THE PARTICULARS OF THE FACTS OF THOSE CASES TO
01:13PM 13 ANALOGIZE THEM TO WHAT I ANTICIPATE WE'LL SEE AT TRIAL.

01:13PM 14 WITH REGARD TO THE REYES CASE, AS THE COURT WELL KNOWS IT
01:13PM 15 WAS AN OPTIONS BACKDATING CASE. THE EVIDENCE THAT WAS ADMITTED
01:13PM 16 THERE EFFECTIVELY ENDED UP BEING THE AMOUNT OF PROFIT REALIZED
01:13PM 17 BY THE DEFENDANT, WHICH ENDED UP BEING ABOUT \$2 MILLION. AT
01:13PM 18 ONE POINT IT HAD A NOTIONAL VALUE OF \$130 MILLION.

01:14PM 19 THE COURT EFFECTIVELY HELD THAT BECAUSE THAT WAS SO
01:14PM 20 INTEGRAL TO THE OFFENSE AND BECAUSE IT SHOWED THAT THERE WOULD
01:14PM 21 BE A FINANCIAL GAIN, THAT IT WAS NOT INAPPROPRIATE TO ADMIT
01:14PM 22 THAT EVIDENCE.

01:14PM 23 I MUST SAY IT WAS UNDER A CLEARLY ERRONEOUS STANDARD OF
01:14PM 24 REVIEW, BUT IT DOESN'T STRIKE ME THAT IF THE STANDARD OF REVIEW
01:14PM 25 HAD BEEN DIFFERENT, WE WOULD HAVE LIKELY SEEN A DIFFERENT

01:14PM 1 RESULT.

01:14PM 2 LET ME TAKE THOSE FACTS AND APPLY THEM TO WHAT I
01:14PM 3 ANTICIPATE WE'LL SEE HERE. THERE ARE REALLY TWO DIFFERENT
01:14PM 4 KINDS OF FINANCIAL TRANSACTIONS THAT WE'LL BE TALKING ABOUT IN
01:14PM 5 THIS CASE. ONE IS VERY SIMPLE, AND ONE IS A LITTLE MORE
01:14PM 6 COMPLEX.

01:14PM 7 OBVIOUSLY AS THE COURT WELL KNOWS AND THE DISCUSSION OVER
01:14PM 8 THE PAST FEW DAYS HAS PRESAGED, WE WILL SEE DISCUSSION OF
01:14PM 9 PATIENTS ENGAGING IN TRANSACTIONS TO BUY BLOOD TESTS. THAT
01:14PM 10 REALLY IS NOT FOR THE MOST PART RELEVANT TO THIS ISSUE.

01:14PM 11 WE EXPECT THAT THE AMOUNTS PAID FOR THOSE TESTS WILL COME
01:14PM 12 INTO THE CASE, AND THAT'S OBVIOUSLY OF NO CONCERN WITH RESPECT
01:15PM 13 TO THIS.

01:15PM 14 THE ISSUE THAT TOUCHES ON THE ISSUE THAT WE'RE CONCERNED
01:15PM 15 ABOUT, BUT WHICH WILL LEAD TO ADMISSIBLE EVIDENCE, IS THE
01:15PM 16 FINANCIAL TRANSACTIONS BY WHICH INVESTORS MADE INVESTMENTS
01:15PM 17 WITHIN THERANOS.

01:15PM 18 OBVIOUSLY THE AMOUNTS OF THOSE INVESTMENTS WILL BE
01:15PM 19 REFLECTED IN EXHIBITS WHICH ARE ADMITTED AT TRIAL. THERE WILL
01:15PM 20 BE TESTIMONY ABOUT THE AMOUNTS THAT INVESTORS EXHIBITED -- THAT
01:15PM 21 INVESTORS INVESTED WITHIN THERANOS.

01:15PM 22 AT THE SAME TIME THE JURY WILL LEARN THROUGH MULTIPLE
01:15PM 23 EXHIBITS HOW MUCH THAT INVESTMENT CONSTITUTES AS A PERCENTAGE
01:15PM 24 OF THE COMPANY, THE PERCENTAGE OF THE COMPANY THAT MS. HOLMES
01:15PM 25 OWNED, AND FROM THAT THE JURY WILL OBVIOUSLY BE ABLE TO AT

01:15PM 1 LEAST ON A SNAPSHOT BASIS OVER TIME GET A SENSE OF WHAT THE
01:15PM 2 NOTIONAL VALUE OF MS. HOLMES'S WEALTH IN THE COMPANY WAS AT
01:15PM 3 THAT POINT.

01:15PM 4 I DON'T THINK THERE'S ANY WAY TO AVOID THAT IN THIS CASE,
01:15PM 5 AND I DON'T SEEK TO AVOID IT BY THIS MOTION. I THINK IF I DID
01:16PM 6 SEEK TO AVOID IT, THE REYES CASE WOULD PROBABLY SAY I SHOULD
01:16PM 7 LOSE THAT ARGUMENT.

01:16PM 8 THIS MOTION ISN'T ABOUT THOSE ISSUES. THIS MOTION IS
01:16PM 9 ABOUT WHAT IS IN THE GOVERNMENT'S 404(B) NOTICE AND
01:16PM 10 SPECIFICALLY WHAT IS IN EXHIBIT 3 TO THE SAHARIA AFFIDAVIT.

01:16PM 11 WHAT THE GOVERNMENT WANTS TO DO IN THIS CASE AND WHAT MOST
01:16PM 12 CERTAINLY SHOULD NOT BE ADMITTED, AND ACTUALLY TO MY KNOWLEDGE
01:16PM 13 I'VE STRUGGLED TO FIND A CASE WHERE IT'S EVER BEEN ADMITTED, IS
01:16PM 14 TO TAKE EVIDENCE WHICH IS UNRELATED TO THE CRIME, WHICH IS HOW
01:16PM 15 WEALTH, WHICH IS IN THE GOVERNMENT'S VIEW DERIVED AT LEAST IN
01:16PM 16 PART FOR FRAUDULENT ACTIVITY, TO LOOK AT THAT AND TO ASK HOW
01:16PM 17 WAS THAT MONEY SPENT. AND THAT IS CLEARLY PROHIBITED UNDER
01:16PM 18 NINTH CIRCUIT LAW.

01:16PM 19 THE ONLY ELEMENT OF WEALTH THAT IS RELEVANT IS THE ELEMENT
01:16PM 20 OF DEMONSTRATING THAT THERE WAS A FINANCIAL GAIN OR AN
01:17PM 21 ANTICIPATED FINANCIAL GAIN TO A DEFENDANT IN CONNECTION WITH
01:17PM 22 THE TRANSACTION.

01:17PM 23 SO WHAT ARE WE SPECIFICALLY TALKING ABOUT HERE THAT I'M
01:17PM 24 CONCERNED ABOUT? IT'S ALL OF THE EVIDENCE THAT THE GOVERNMENT
01:17PM 25 GAVE US IN CONNECTION WITH ITS DISCLOSURE CONCERNING THE

01:17PM 1 ARGUMENTS IT WANTS TO MAKE ON WEALTH, THE REASON IT WANTS TO
01:17PM 2 MAKE THOSE ARGUMENTS, AND THE DOCUMENTS THAT IT WILL SEEK TO
01:17PM 3 EXIST.

01:17PM 4 WHAT ARE THEY? I'M NOT SURE THAT'S ENTIRELY CLEAR FOR THE
01:17PM 5 COURT FROM THE PAPERS THAT WE SUBMITTED, SO I WANT TO MAKE SURE
01:17PM 6 THAT THE COURT UNDERSTANDS IT.

01:17PM 7 LARGELY THE EVIDENCE IS IN THE FORM OF EMAILS. MANY OF
01:17PM 8 THE EMAILS ARE ESSENTIALLY DAILY TO-DO LISTS EITHER COMPLETED
01:17PM 9 OR ANTICIPATED FOR MS. HOLMES'S ASSISTANT. THEY ARE, I WILL
01:17PM 10 SAY TO YOUR HONOR, A VAST SUBSECTION OF DAILY EMAILS, AND
01:17PM 11 THEY'VE BEEN TENDENTIOUSLY SELECTED BY THE GOVERNMENT FOR A
01:17PM 12 PARTICULAR PURPOSE.

01:18PM 13 WHAT IS THEIR PURPOSE? THEY REFERENCE POTENTIALLY A
01:18PM 14 DINNER AT A RESTAURANT WHICH THE GOVERNMENT CHARACTERIZES, AND
01:18PM 15 PROBABLY APPROPRIATELY SO, AS A LUXURIOUS RESTAURANT. THEY
01:18PM 16 MIGHT REFERENCE A PURCHASE OF CLOTHING, A PURCHASE OF JEWELRY,
01:18PM 17 ET CETERA.

01:18PM 18 I ANTICIPATE THAT MY FRIENDS WILL BE EAGER TO GIVE THE
01:18PM 19 COURT MORE DETAIL ON THAT, BUT I THINK IT'S SAFE TO SAY THAT
01:18PM 20 THEY ARE EMAILS DISCUSSING PURCHASES OF WHAT MS. HOLMES WORE,
01:18PM 21 HOW HER HAIR WAS DONE, WHAT SHOES SHE CHOSE TO WEAR, WHERE SHE
01:18PM 22 STAYED, HOW SHE FLEW, ET CETERA.

01:18PM 23 NOW, TAKE THAT EVIDENCE AND COMPARE IT TO THE REYES CASE.
01:18PM 24 WE HAVE NO IDEA WHAT THE CEO OF BROCADE, MR. REYES, WORE. WE
01:18PM 25 HAVE NO IDEA WHERE HE STAYED, WE HAVE NO IDEA HOW HE TRAVELLED

01:18PM 1 BY FLIGHT. NONE OF THAT EVIDENCE TO THE BEST THAT I CAN
01:18PM 2 REINSTRUCT DID THE GOVERNMENT EVEN SEEK TO INTRODUCE IN THAT
01:19PM 3 CASE.

01:19PM 4 AND WHY? FOR THE OBVIOUS REASON THAT THE FOUNDATIONAL
01:19PM 5 PRINCIPLE AROUND THIS TYPE OF EVIDENCE IS THAT EVIDENCE WHICH
01:19PM 6 IS DESIGNED MERELY TO SHOW EITHER WEALTH ON THE PART OF THE
01:19PM 7 DEFENDANT IS PRECLUDED UNDER RULE 401 OR EVIDENCE WHICH IS
01:19PM 8 DESIGNED TO INFLAME THE JURY OR TO SUGGEST TO THE JURY THAT THE
01:19PM 9 DEFENDANT HAS THE LIFESTYLE OF A WEALTHY PERSON IS CONSIDERED
01:19PM 10 INADMISSIBLE UNDER 403.

01:19PM 11 THAT IS IN NO WAY UNDERMINED BY THE RULING IN REYES NOR BY
01:19PM 12 ANY OTHER CASE CITED BY THE GOVERNMENT.

01:19PM 13 NOW, I SAY WITH RESPECT TO ALL OF THIS, YOUR HONOR, I,
01:19PM 14 AGAIN, HAVE NO ISSUE WITH THE DETAILS OF THE TRANSACTIONS
01:19PM 15 COMING IN. WE INTEND FULLY TO EXAMINE THE DETAILS OF THOSE
01:19PM 16 TRANSACTIONS. WE INTEND TO EXAMINE TRANSACTIONS WHICH WERE
01:19PM 17 PROPOSED TO MS. HOLMES WHICH WOULD HAVE ALLOWED HER TO CONVERT
01:20PM 18 HER HOLDINGS IN THERANOS INTO SUBSTANTIAL FINANCIAL WEALTH
01:20PM 19 WHICH SHE REJECTED CONSISTENTLY OVER MANY YEARS. ALL OF THAT
01:20PM 20 WILL BE PART OF THIS TRIAL.

01:20PM 21 BUT WHAT SHE WORE, WHERE SHE STAYED, HOW SHE FLEW, WHAT
01:20PM 22 SHE ATE HAS NOTHING TO DO WITH THIS TRIAL. IF THAT COMES INTO
01:20PM 23 THIS TRIAL, WE WILL BE FORCED TO STAND IN THIS COURTROOM AND
01:20PM 24 INTRODUCE THE OTHER SEVERAL HUNDREDS OF EMAILS PREPARED BY HER
01:20PM 25 ASSISTANT SHOWING WHAT HER DAILY ACTIVITIES WERE TO

01:20PM 1 CONTEXTUALIZE THE IMPRESSIONS THAT THE GOVERNMENT WILL HAVE
01:20PM 2 SOUGHT TO CREATE.

01:20PM 3 SO THOSE ARE THE TWO CATEGORIES OF EVIDENCE THAT I THINK
01:20PM 4 ARE AT ISSUE HERE.

01:20PM 5 THE THIRD ISSUE IS WHAT SHOULD THE COURT'S CONCERNS BE
01:20PM 6 BEFORE WE GET TO THE EVIDENCE? AND I WOULD ASK YOUR HONOR AS
01:20PM 7 YOU THINK ABOUT THESE MOTIONS, I THINK YOUR HONOR CAN RECOGNIZE
01:20PM 8 THAT WE'VE HAD WHAT I THINK HAS BEEN A FRUITFUL DISCUSSION OVER
01:20PM 9 A COUPLE OF DAYS ABOUT CORE ISSUES IN THE CASE. WHAT IS THE
01:21PM 10 SCIENCE? WHAT IS THE TECHNOLOGY? DOES IT DO WHAT
01:21PM 11 REPRESENTATIONS SUGGEST THAT IT COULD DO, ET CETERA?

01:21PM 12 WE'RE NOW VERY FAR ON THE PERIPHERY, AND WE'RE IN THE AREA
01:21PM 13 THAT I THINK EXPERIENCE TEACHES US IS VERY DANGEROUS BECAUSE
01:21PM 14 COMMENT ON ISSUES SUCH AS WEALTH IS PRECISELY THE KIND OF THING
01:21PM 15 THAT HAPPENS IN A CASE THAT UNDERMINES ITS INTEGRITY.

01:21PM 16 SO I WOULD ASK YOUR HONOR NOT ONLY TO CONSIDER THE
01:21PM 17 EXCLUSION THAT WE'VE ASKED FOR OF THE EVIDENCE BUT TO DO WHAT I
01:21PM 18 KNOW YOUR HONOR ALWAYS DOES, WHICH IS TO POLICE COMMENT IN
01:21PM 19 OPENING ON THIS BECAUSE I THINK THIS IS THE KIND OF
01:21PM 20 INFLAMMATORY COMMENTARY THAT COULD DO GREAT DAMAGE TO THE
01:21PM 21 TRIAL.

01:21PM 22 MANY OF THE ISSUES THAT WE HAVE BEEN DISCUSSING HERETOFORE
01:21PM 23 ARE ISSUES THAT REALISTICALLY THEY PROBABLY ARE BEST DEFERRED
01:21PM 24 AT THIS POINT.

01:21PM 25 I THINK THIS ISSUE CRIES OUT FOR A LITTLE MORE SPECIFIC

01:22PM 1 COMMENTARY FROM THE COURT AND A LITTLE CLEARER PROHIBITION ON
01:22PM 2 WHAT MAY AND MAY NOT BE SAID IN OPENING.

01:22PM 3 AND I THINK, YOUR HONOR, THE CASES ARE ABUNDANTLY CLEAR
01:22PM 4 THAT COMMENTARY WHICH SUGGESTS EITHER THAT MS. HOLMES AND HER
01:22PM 5 SPENDING ARE MOTIVATIONS FOR A CRIME IS CLEARLY PROHIBITED AS
01:22PM 6 IS THE ARGUMENT THAT THE MERE DESIRE TO CREATE WEALTH IS
01:22PM 7 PROHIBITED BY CASES THAT THE NINTH CIRCUIT HAS CITED.

01:22PM 8 SO I'D BE HAPPY TO ANSWER ANY FURTHER ANY QUESTIONS THAT
01:22PM 9 THE COURT HAS, BUT THAT'S OUR POSITION ON THIS ISSUE.

01:22PM 10 THE COURT: ALL RIGHT. WHO STANDS TO RESPOND?

01:22PM 11 MR. BOSTIC. THANK YOU.

01:22PM 12 MR. BOSTIC, THANK YOU.

01:22PM 13 WHAT I HEAR MR. DOWNEY SUGGESTING IS THAT HE DOES NOT WANT
01:22PM 14 THIS PROSECUTION TO BE ONE OF A LIFESTYLE OR CLASS PROSECUTION.
01:23PM 15 I THINK YOU PROBABLY HEARD HIM SAY THAT AS WELL.

01:23PM 16 IS THAT WHAT THE GOVERNMENT INTENDS?

01:23PM 17 MR. BOSTIC: CERTAINLY NOT, YOUR HONOR.

01:23PM 18 THE GOVERNMENT DOES NOT INTEND TO PRESENT THE EVIDENCE IN
01:23PM 19 QUESTION FOR ANY IMPROPER PURPOSE. THE GOVERNMENT IS AWARE OF
01:23PM 20 THE NINTH CIRCUIT LAW AND THE OTHER LAWS REGARDING THE
01:23PM 21 INTRODUCTION OF THIS KIND OF EVIDENCE.

01:23PM 22 BUT I HAVE TO SAY LISTENING TO MY COUNTERPART'S ARGUMENT,
01:23PM 23 I WAS STRUCK BY THE FACT THAT WHAT HE SEEMS TO BE ASKING FOR
01:23PM 24 TODAY FEELS MUCH NARROWER THAN WHAT THE MOTION COVERS AND WHAT
01:23PM 25 THE BRIEFING COVERS.

THE ARGUMENT TODAY WAS FOCUSSED ON A SPECIFIC SUBSET OF EVIDENCE SPECIFYING OR SPECIFICALLY DEALING WITH EMAILS BETWEEN THE DEFENDANT AND HER ASSISTANT REGARDING TASKS FOR THAT DAY. THERE ARE SOME OF THOSE ITEMS ON THE GOVERNMENT'S EXHIBIT LIST. I'LL ADDRESS THOSE SHORTLY, BUT I DIDN'T HEAR MY COUNTERPART TALK ABOUT ITEMS LIKE THE DEFENDANT'S SALARY AT THERANOS, THE OTHER TANGIBLE OR INTANGIBLE BENEFITS THAT SHE OBTAINED FROM HER POSITION AT THERANOS WHEREAS READING THE BRIEFING IT SEEMS LIKE THE DEFENSE WAS SEEKING TO EXCLUDE ALL OF THAT.

I AGREE WITH MR. DOWNEY THAT THE LAW ON THIS AREA IS QUITE CLEAR AND THAT THE PARTIES ARE SIMPLY ON DIFFERENT PAGES WHEN IT COMES TO WHAT EVIDENCE THE GOVERNMENT IS GOING TO INTRODUCE AND FOR WHAT PURPOSE. SO LET ME SEE IF I CAN UNTANGLE THAT FOR THE COURT'S BENEFIT.

IT SHOULDN'T BE CONTROVERSIAL THAT IN A FRAUD CASE WHERE THE OUTCOME TURNS ON THE DEFENDANT'S INTENT, THE PROSECUTION IS GOING TO INTRODUCE EVIDENCE THAT WILL ALLOW THE JURY TO UNDERSTAND NOT JUST WHAT THE DEFENDANT DID BUT WHY.

SO HERE IT WILL BE UP TO THE JURY TO DETERMINE WHETHER THIS DEFENDANT ENGAGED IN SCHEMES TO DEFRAUD VICTIMS. IN ORDER FOR THE JURY TO PERFORM THAT FUNCTION, THEY'RE ENTITLED TO HEAR FACTS REGARDING SPECIFIC ACTIONS THAT THE DEFENDANT TOOK AND THE DEFENDANT'S MOTIVE AND INTENT. AND WHEN IT COMES TO MOTIVE AND INTENT, THAT NEEDS TO INCLUDE FACTS REGARDING THE BENEFITS THAT DEFENDANT RECEIVED FROM CARRYING OUT THOSE FRAUDULENT

01:25PM 1 SCHEMES.

01:25PM 2 THIS IS VERY IMPORTANT EVIDENCE BECAUSE THE JURY WILL BE
01:25PM 3 ASKED TO JUDGE MENTAL STATE AT THE END OF THE TRIAL. WHEN WE
01:25PM 4 ASK THEM TO MAKE FINDINGS ABOUT AN INDIVIDUAL'S MENTAL STATE,
01:25PM 5 IT MAKES SENSE FOR THEM TO EXAMINE THE RESULTS OF THE
01:25PM 6 DEFENDANT'S ACTIONS BECAUSE IT ONLY STANDS TO REASON THAT A
01:25PM 7 PERSON INTENDS THE RESULTS OF THEIR ACTIONS.

01:25PM 8 AND IN THIS CASE WHAT RESULTED FROM DEFENDANT'S FRAUDULENT
01:25PM 9 ACTIONS WERE THAT SHE OBTAINED A SIGNIFICANT AMOUNT OF WEALTH
01:25PM 10 AS WELL AS OTHER BENEFITS, BOTH TANGIBLE AND INTANGIBLE FROM
01:25PM 11 THAT FRAUD.

01:25PM 12 THE DEFENSE CITES CASES SAYING THAT THE GOVERNMENT IS NOT
01:25PM 13 REQUIRED TO PROVE THAT A DEFENDANT PERSONALLY BENEFITTED. JUST
01:26PM 14 TO BE CLEAR, THOSE CASES ARE IN CONTEXT OF DEFENDANT'S
01:26PM 15 CHALLENGING CONVICTIONS FOR FAILURE TO PROVE AN INTENT TO
01:26PM 16 PERSONALLY BENEFIT OR THAT THE DEFENDANT PERSONALLY BENEFITTED.

01:26PM 17 THOSE CASES HAVE NOTHING TO DO WITH WHAT KIND OF EVIDENCE
01:26PM 18 IS PERMITTED AT TRIAL, WHAT KIND OF EVIDENCE IS RELEVANT. AND
01:26PM 19 TO THE EXTENT THAT THE CASES ADDRESS THAT, THEY MAKE IT VERY
01:26PM 20 CLEAR THAT EVIDENCE OF A FRAUDSTER'S PERSONAL BENEFIT IS
01:26PM 21 SQUARELY WITHIN THE REALM OF WHAT IS RELEVANT AT TRIAL, WHAT IS
01:26PM 22 IMPORTANT FOR A JURY TO HEAR.

01:26PM 23 THERE'S ANOTHER LINE OF CASES BARRING INTRODUCTION OF
01:26PM 24 WEALTH EVIDENCE MERELY FOR THE PURPOSE OF SHOWING THAT A
01:26PM 25 DEFENDANT IS WEALTHY OR IMPOVERISHED.

01:26PM 1 THESE CASES, THOUGH, DEAL WITH A DEFENDANT'S FINANCIAL
01:26PM 2 SITUATION INDEPENDENT FROM THE CRIMINAL CONDUCT THAT IS
01:26PM 3 CHARGED.

01:26PM 4 SO LOOKING AT CASES LIKE HATFIELD AND MITCHELL, IT'S VERY
01:26PM 5 CLEAR THAT THOSE CASES INVOLVE WHETHER IT'S APPROPRIATE FOR THE
01:26PM 6 PROSECUTION TO BRING IN EVIDENCE OF WHETHER A DEFENDANT HAPPENS
01:27PM 7 TO BE RICH OR POOR SEPARATE FROM AND INDEPENDENT FROM THE
01:27PM 8 CHARGED CONDUCT IN THE CASE.

01:27PM 9 SO THE GOVERNMENT RECOGNIZES THAT, AND THERE'S NO
01:27PM 10 INTENTION BY THE GOVERNMENT HERE TO INTRODUCE EVIDENCE
01:27PM 11 REGARDING DEFENDANT'S FINANCIAL SITUATION INDEPENDENT FROM THE
01:27PM 12 FRAUD HERE.

01:27PM 13 THE COURT: SO PARDON ME.

01:27PM 14 MR. BOSTIC: YES.

01:27PM 15 THE COURT: SO IS IT THE GOVERNMENT'S POSITION THAT
01:27PM 16 BECAUSE SHE HAD A POSITION AT THERANOS, SHE IS A SALARIED
01:27PM 17 EMPLOYEE, WHATEVER IT WAS, SHE RECEIVED COMPENSATION, AND THE
01:27PM 18 GOVERNMENT BELIEVES THAT SHE ENGAGED IN FRAUDULENT CONDUCT
01:27PM 19 WHILE SHE WAS IN THAT POSITION, HER SALARY SHOULD BE BROUGHT TO
01:27PM 20 THE JURY'S ATTENTION BECAUSE IT WAS ILL-GOTTEN GAIN?

01:27PM 21 MR. BOSTIC: THAT'S CORRECT, YOUR HONOR.

01:27PM 22 AND THAT WOULD NOT BE TRUE FOR ANY CEO. SO IF THE DEFENSE
01:27PM 23 COMPARES THE SITUATION TO OTHER HYPOTHETICAL AND ACTUAL CEO'S
01:28PM 24 OF SUCCESSFUL COMPANIES, AND CORRECTLY NOTES THAT CEO'S OF
01:28PM 25 SUCCESSFUL COMPANIES TEND TO LIVE VERY NICE LIFESTYLES. THEY

01:28PM 1 EARN SIGNIFICANT AMOUNTS OF MONEY, THEY EXPERIENCE A VARIETY OF
01:28PM 2 DIFFERENT KINDS OF PERKS. THERE'S NOTHING NECESSARILY
01:28PM 3 NEFARIOUS ABOUT THAT, AND THE GOVERNMENT DOESN'T INTEND TO
01:28PM 4 SUGGEST OTHERWISE.

01:28PM 5 BUT IN THIS CASE THE EVIDENCE WILL SHOW THAT THE FRAUD IN
01:28PM 6 THIS CASE WAS THE BUT-FOR CAUSE OF THE SUCCESS OF THERANOS.

01:28PM 7 SO THIS ISN'T A SITUATION WHERE THE COMPANY IS SUCCESSFUL
01:28PM 8 AND PROFITABLE ON ITS OWN, A FRAUD OCCURS, A DISCRETE FRAUD
01:28PM 9 OCCURS AT THAT COMPANY, AND THEN THE PROSECUTION SEEKS TO
01:28PM 10 INTRODUCE EVIDENCE OF THE FOUNDER'S WEALTH FROM THE COMPANY
01:28PM 11 OPERATIONS IN GENERAL.

01:28PM 12 THE COURT: SO THE GOVERNMENT WOULD SAY OUR
01:28PM 13 ALLEGATION IS SHE SUBMITTED FRAUD, CONSPIRED TO DO SO, SHE WAS
01:28PM 14 WHATEVER HER POSITION WAS, AND IN THAT POSITION SHE EARNED THE
01:29PM 15 SALARY OF X, THAT'S WHAT HER POSITION IS, AND SHE WAS PAID
01:29PM 16 THAT, SHE EARNED THAT FROM THE COMPANY AND SHE WAS COMMITTING
01:29PM 17 FRAUD, AND SO YOU, JURY, CAN CONSIDER THAT AS MOTIVE FOR HER
01:29PM 18 CONTINUING TO DO A FRAUD BECAUSE SHE HAD A NICE SALARY AND THE
01:29PM 19 JOB SHE WAS DOING THERE WAS FRAUDULENT AND YOU CAN CONSIDER
01:29PM 20 THAT?

01:29PM 21 MR. BOSTIC: I THINK IT'S PARTLY THAT, BUT IT'S LESS
01:29PM 22 ABOUT PRESERVING A SITUATION THAT DEFENDANT HAPPENED TO FIND
01:29PM 23 HERSELF IN, AND IT'S MORE ABOUT HOW SHE ENDED UP IN THAT
01:29PM 24 FAVORABLE POSITION TO BEGIN WITH.

01:29PM 25 SO IN THIS CASE --

01:29PM 1 THE COURT: SO IS IT RELEVANT BEYOND -- I'M SORRY TO
01:29PM 2 INTERRUPT YOU.

01:29PM 3 BUT IS IT RELEVANT BEYOND THAT TO SAY THAT SHE DINNED AT
01:29PM 4 EXCLUSIVE RESTAURANTS, SHE SHOPPED AT FINE STORES, SHE HAD HER
01:30PM 5 HAIR DONE AT DIFFERENT PLACES, IS THAT ALL -- IT SEEMS LIKE
01:30PM 6 THAT'S DESIGNED TO ENGAGE A CLASS CONVERSATION AMONGST THE
01:30PM 7 JURORS, WHICH I THINK YOU WOULD AGREE WOULD BE A LITTLE
01:30PM 8 DANGEROUS.

01:30PM 9 MR. BOSTIC: I UNDERSTAND THE DANGERS AROUND THAT
01:30PM 10 KIND OF EVIDENCE, YOUR HONOR, AND I THINK THE ANSWER DEPENDS.
01:30PM 11 THE ANSWER DEPENDS ON WHETHER THAT -- WHETHER THOSE ITEMS ARE
01:30PM 12 SIMPLY ARE, AS THE DEFENSE CHARACTERIZES THEM, EXPENSES, THE
01:30PM 13 WAY THAT THE DEFENDANT SPENT THE MONEY SHE EARNED THROUGH
01:30PM 14 COMPENSATION OR WHETHER THEY WERE ADDITIONAL PERKS THAT SHE
01:30PM 15 RECEIVED FROM THE COMPANY. SO I THINK IT MAKES SENSE TO
01:30PM 16 SEPARATE THEM INTO THOSE TWO CATEGORIES.

01:30PM 17 TO THE EXTENT THAT THEY'RE SIMPLY ITEMS OF SPENDING,
01:30PM 18 THAT'S HOW THE DEFENDANT DECIDED TO SPEND THE COMPENSATION THAT
01:30PM 19 SHE RECEIVED, I THINK IT'S SUFFICIENT FOR THE PROSECUTION'S
01:30PM 20 PURPOSES SIMPLY TO INTRODUCE THE AMOUNT OF COMPENSATION SO THE
01:30PM 21 JURY UNDERSTANDS WHAT BENEFIT WAS ACTUALLY FLOWING FROM THE
01:30PM 22 FRAUD, AND I'LL GET BACK TO THAT IN A SECOND.

01:30PM 23 BUT AS TO OTHER ITEMS, FOR EXAMPLE, THE DEFENSE MOTION
01:31PM 24 REFERENCES TRAVEL AND LODGING, AND TO THE EXTENT THAT THE
01:31PM 25 DEFENDANT CHOSE TO SPEND HER COMPENSATION TAKING LUXURY TRIPS,

01:31PM 1 AGAIN, THAT CAN ALL FALL WITHIN THE AMOUNT OF THE COMPENSATION
01:31PM 2 ITSELF. THERE'S NO NEED FOR THE GOVERNMENT TO INTRODUCE TO THE
01:31PM 3 JURY EVIDENCE OF HOW SHE SPENT HER MONEY. THE GOVERNMENT
01:31PM 4 UNDERSTANDS THE CASE LAW ON THAT. THAT'S NOT WHAT THIS IS
01:31PM 5 ABOUT.

01:31PM 6 TO THE EXTENT THAT THE COMPANY, HOWEVER, IN ADDITION TO
01:31PM 7 HER SALARY PROVIDED FOR HER LUXURIOUS TRAVEL ON PRIVATE JETS,
01:31PM 8 EXPENSIVE LODGING AND TRIPS, THESE OTHER TANGIBLE AND
01:31PM 9 INTANGIBLE BENEFITS AS A RESULT OF HER POSITION IN THE COMPANY
01:31PM 10 AND ULTIMATELY AS A RESULT OF THE SUCCESS OF THE COMPANY THAT
01:31PM 11 FLOWS FROM THE FRAUD, TO THE EXTENT THAT THAT'S THE CASE, THOSE
01:31PM 12 BENEFITS BELONG IN THE SAME CATEGORY AS THE COMPENSATION AND
01:31PM 13 THE JURY SHOULD --

01:31PM 14 THE COURT: SHOULD WE KNOW THE DISTINCTION BETWEEN
01:31PM 15 THAT TREATMENT AT THERANOS AND THE TREATMENT OF ANY OTHER
01:32PM 16 SILICON VALLEY CEO IF WE DRIVE ON HIGHWAY 101 OR IF WE DRIVE
01:32PM 17 DOWN SANDHILL ROAD OR PAGE MILL ROAD, DO WE NEED TO PULL
01:32PM 18 COMPARATORS FROM ANY OF THESE GEOGRAPHIC REASONS TO SEE IF IT'S
01:32PM 19 DIFFERENT?

01:32PM 20 MR. BOSTIC: NO, YOUR HONOR, BECAUSE THE POINT OF
01:32PM 21 THIS EVIDENCE IS NOT TO INVITE THAT COMPARISON OR TO MAKE ANY
01:32PM 22 POINT ABOUT HOW THE DEFENDANT'S COMPENSATION OR BENEFITS
01:32PM 23 STACKED UP AGAINST OTHER CEO'S OF SUCCESSFUL COMPANIES.

01:32PM 24 BUT, AGAIN, THE POINT HERE IS THAT THE SO-CALLED SUCCESS
01:32PM 25 OF THERANOS WAS ENTIRELY THE PRODUCT OF A FRAUD. SO IT DOESN'T

01:32PM 1 MAKE SENSE TO COMPARE THIS TO OTHER COMPANIES THAT OPERATE
01:32PM 2 LEGITIMATELY AS FAR AS WE KNOW THAT PRODUCE PROFITS NOT AS A
01:32PM 3 RESULT OF FRAUD.

01:32PM 4 HERE, FOR EXAMPLE --

01:33PM 5 THE COURT: WELL, WOULDN'T THAT CHANGE YOUR
01:33PM 6 ARGUMENT, THOUGH, IF ALL CEO'S ARE -- FLY FIRST CLASS AND THEIR
01:33PM 7 BOARDS ALLOW THEM TO STAY AT THE FOUR SEASONS, OR WHATEVER
01:33PM 8 EXCLUSIVE HOTEL WHEN THEY TRAVEL, THEY'RE GIVEN DIFFERENT
01:33PM 9 PRIVILEGES, TREATMENTS, BECAUSE THOSE BOARDS AND THOSE
01:33PM 10 COMPANIES FEEL THAT IT'S APPROPRIATE TO HAVE HIGH RECOGNITION
01:33PM 11 FOR THEIR COMPANY, IT PROVIDES PUBLIC CONFIDENCE IN THE
01:33PM 12 COMPANY, ALL OF THOSE TYPES OF THINGS? DOESN'T THAT GO A
01:33PM 13 LITTLE TOO FAR? IT'S SOMETHING THAT -- WE HAD A CONFERENCE
01:33PM 14 ABOUT THIS, I THINK ON DAY ONE, ABOUT COMPARING DIFFERENT
01:33PM 15 COMPANIES AND LIFESTYLES AND THINGS.

01:33PM 16 SO THAT'S MY CONCERN.

01:33PM 17 MR. BOSTIC: SO, YOUR HONOR, THOSE KINDS OF PERKS
01:33PM 18 ARE CERTAINLY PROBABLY PART AND PARCEL OF BEING A CEO OF A
01:33PM 19 SUCCESSFUL MULTI BILLION DOLLAR COMPANY, AND FOR A TIME
01:33PM 20 THERANOS WAS VALUED AT \$9 BILLION. DURING THAT TIME PERIOD IT
01:33PM 21 CAN BE ARGUED THAT THE DEFENDANT ENJOYED THE PERKS THAT COME
01:34PM 22 WITH BEING A CEO OF A \$9 BILLION COMPANY.

01:34PM 23 BUT THE QUESTION FOR THE CASE IS WHY WAS SHE THE CEO OF A
01:34PM 24 9 BILLION COMPANY? WHY WAS THE COMPANY VALUED THAT HIGHLY?
01:34PM 25 WHY WAS IT SO SUCCESSFUL SUCH THAT SHE WAS ABLE TO ENJOY THESE

01:34PM 1 PERKS?

01:34PM 2 AND IT TURNS OUT THE REASON THE COMPANY WAS THAT
01:34PM 3 SUCCESSFUL WAS ENTIRELY THE RESULT OF THE FRAUD ITSELF. AND
01:34PM 4 THAT'S NOT SPECULATION, BY THE WAY.

01:34PM 5 WE KNOW THAT WHEN THE TRUTH CAME OUT ABOUT THERANOS'S
01:34PM 6 LIMITATIONS, THE FALSE STATEMENTS THAT HAD BEEN GIVEN TO THE
01:34PM 7 PUBLIC EARLIER, THAT SUCCESS EVAPORATED, FRANKLY. THE
01:34PM 8 COMPANY'S VALUE CRATERED, AND THOSE BENEFITS GRADUALLY WENT
01:34PM 9 AWAY, AND THE COMPANY SHUDDERED.

01:34PM 10 SO IT'S NOT SPECULATION TO SAY THAT THE SUCCESS OF THE
01:34PM 11 COMPANY, THE HYPE, THE EXCITEMENT THAT SURROUNDED THE COMPANY,
01:34PM 12 THE EASE OF WHICH IT ATTRACTED INVESTORS THAT ALLOWED IT TO
01:34PM 13 FUND AND PROVIDE THOSE BENEFITS TO THE DEFENDANT, THAT WAS ALL
01:34PM 14 A PRODUCT OF THE FRAUD.

01:35PM 15 SO IN CASES LIKE REYES IT'S SIMPLER. IT'S SIMPLER TO
01:35PM 16 SEPARATE OUT THE DEFENDANT'S, LET'S SAY, LEGITIMATE INCOME JUST
01:35PM 17 BY VIRTUE OF BEING A CEO OF WHAT WOULD BE STILL BE A SUCCESSFUL
01:35PM 18 COMPANY EVEN WITHOUT THE BACKDATING OFFENSE IN THAT CASE, IT'S
01:35PM 19 EASY TO SEPARATE THAT FROM THE SPECIFIC BENEFITS AND THE PROFIT
01:35PM 20 THAT HAS BEEN OBTAINED BY THE DEFENDANT IN THAT CASE AS A
01:35PM 21 RESULT OF THE BACKDATING.

01:35PM 22 THE COURT: RIGHT. THAT'S A PERSONAL PROFIT TO THAT
01:35PM 23 DEFENDANT.

01:35PM 24 MR. BOSTIC: EXACTLY.

01:35PM 25 THE COURT: BY BACKDATING STOCK. THAT WAS IMMEDIATE

01:35PM 1 MONEY INTO HIS BANK ACCOUNT, HIS POCKET.

01:35PM 2 MR. BOSTIC: BUT THE SAME PRINCIPLE APPLIES HERE.

01:35PM 3 THE RESULT OF THE FRAUD IN THIS CASE WAS NOT THAT THE ENTIRE
01:35PM 4 LOSS AMOUNT WENT DIRECTLY TO THE DEFENDANT.

01:35PM 5 AS MR. DOWNEY ALLUDED TO, THE TRANSACTIONS IN THIS CASE
01:35PM 6 INVOLVE PATIENTS PAYING THERANOS FOR TEST RESULTS AND INVESTORS
01:35PM 7 WRITING CHECKS TO THERANOS SO THAT THEY COULD PURCHASE EQUITY
01:35PM 8 IN THE COMPANY. NEITHER OF THOSE RESULTS IN MONEY FLOWING
01:36PM 9 DIRECTLY TO THE DEFENDANT.

01:36PM 10 SO WITHOUT ALLOWING THE JURY TO UNDERSTAND HOW THIS FRAUD
01:36PM 11 BENEFITTED THE DEFENDANT, THE JURY WILL BE LEFT WITH ONLY A
01:36PM 12 PARTIAL PICTURE OF HER INTENT IN THIS CASE.

01:36PM 13 THE FACT IS THAT THE EVIDENCE OF THE BENEFITS THAT FLOWED
01:36PM 14 TO MS. HOLMES FILL IN THE LAST PIECE IN THAT PUZZLE. THEY MAKE
01:36PM 15 IT CLEAR TO THE JURY HOW THIS BENEFIT ACTUALLY -- EXCUSE ME,
01:36PM 16 HOW THIS FRAUD ACTUALLY DID BENEFIT THE DEFENDANT WHICH IN TURN
01:36PM 17 BECOMES ADMISSIBLE EVIDENCE OF HER INTENT.

01:36PM 18 THE COURT: SO IS IT ENOUGH TO SAY THAT SHE MADE
01:36PM 19 WHATEVER, INSERT HER SALARY HERE? WHY ISN'T THAT ENOUGH?

01:36PM 20 MR. BOSTIC: SO, YOUR HONOR, I THINK THAT'S PART OF
01:36PM 21 IT. COMPENSATION SHOULD CERTAINLY BE ADMISSIBLE.

01:36PM 22 AGAIN, THE FAIR INFERENCE FROM THE JURY IS THAT SHE WOULD
01:36PM 23 NOT HAVE RECEIVED THIS FAIRLY HIGH COMPENSATION IN LINE WITH
01:36PM 24 CEO'S OF OTHER MULTI BILLION DOLLAR COMPANIES, BUT SHE WOULD
01:36PM 25 NOT HAVE RECEIVED THIS HIGH COMPENSATION WERE IT NOT FOR THE

01:37PM 1 FRAUD THAT CREATED THAT SUCCESS IN THAT COMPANY.

01:37PM 2 SO COMPENSATION IS ONE CATEGORY. HER OWNERSHIP OF STOCK
01:37PM 3 IN THE COMPANY IS ANOTHER AND THE VALUE OF THAT STOCK.

01:37PM 4 AS A DIRECT AND PREDICTABLE AND INTENDED RESULT OF THE
01:37PM 5 FRAUD, THE VALUE OF THE STOCK OF THERANOS SKYROCKETED AND AT
01:37PM 6 SOME POINT AT LEAST ON PAPER THE DEFENDANT WAS ONE OF THE
01:37PM 7 WEALTHIEST PEOPLE IN THE WORLD. SHE WAS A BILLIONAIRE. THE
01:37PM 8 JURY SHOULD BE ENTITLED TO KNOW ABOUT THAT. THAT IS CERTAINLY
01:37PM 9 PART OF THE MOTIVE EVIDENCE IN THIS CASE, AND IT HELPS EXPLAIN
01:37PM 10 WHY THE DEFENDANT TOOK THE ACTIONS THAT SHE DID.

01:37PM 11 ANOTHER CATEGORY WE'VE ALREADY DISCUSSED: COMPANY PERKS.
01:37PM 12 SO THAT INCLUDES TRAVEL PAID FOR BY THE COMPANY, LODGING, AND
01:37PM 13 USE OF AN ASSISTANT FALLS WITHIN THAT.

01:37PM 14 YOU HEARD MR. DOWNEY REFERENCE WHAT WE EXPECT TO BE A
01:37PM 15 PROMINENT FEATURE OF THE DEFENSE AT TRIAL WHICH IS EVIDENCE
01:37PM 16 TENDING TO SHOW THAT THE DEFENDANT WAS MOTIVATED BY EITHER
01:37PM 17 ALTRUISTIC REASONS OR AT LEAST REASONS INDEPENDENT OF
01:38PM 18 ACCUMULATING WEALTH.

01:38PM 19 THE COURT: THIS IS A DIFFERENT POINT, AND THIS IS
01:38PM 20 SOMETHING THAT I HAVE INTEREST IN, AND I WAS GOING TO ASK.

01:38PM 21 MR. WADE WILL PROBABLY COME TO THE LECTERN BY INVITATION
01:38PM 22 IN JUST A MOMENT BECAUSE IT MIGHT CHANGE THINGS IF THERE IS
01:38PM 23 EVIDENCE WHERE MS. HOLMES EXPRESSED I'M IN THIS NOT FOR PROFIT,
01:38PM 24 I'M IN THIS BECAUSE I BELIEVE IN THE GOOD OF THE WORLD, I HAVE
01:38PM 25 ALTRUISTIC INTEREST IN DOING WHAT I'M DOING, AND I TAKE NO

01:38PM 1 PERSONAL PROFIT.

01:38PM 2 DOES THAT CHANGE THINGS, MR. WADE?

01:38PM 3 I'M SORRY, MR. BOSTIC, TO INTERRUPT YOU. IT'S A GOOD TIME
01:38PM 4 TO HAVE THIS QUESTION ANSWERED.

01:38PM 5 MR. BOSTIC: OF COURSE, YOUR HONOR.

01:38PM 6 MR. DOWNEY: FIRST OF ALL, LET ME SAY THAT I
01:38PM 7 APPRECIATE YOUR TAKING TEN YEARS OFF OF MY LIFE, BUT I'M
01:38PM 8 MR. DOWNEY.

01:38PM 9 THE COURT: I BEG YOUR PARDON. I'M SORRY.

01:38PM 10 MR. DOWNEY: YOUR HONOR, I THINK THE REASON I BEGAN
01:38PM 11 WITH THE STRUCTURE OF THE TRANSACTION IS THAT'S REALLY THE
01:38PM 12 BEGINNING AND THE END OF THIS INQUIRY. AND WITH RESPECT TO
01:39PM 13 MR. BOSTIC, I THINK HIS ANALYSIS OF IT SLIGHTLY MISSES IT.

01:39PM 14 IN THIS CASE THE LOSS SUFFERED, PUTATIVE LOSS SUFFERED BY
01:39PM 15 THE GOVERNMENT'S ALLEGED VICTIMS IS THE AMOUNT OF MONEY THAT
01:39PM 16 THEY PAID FOR THEIR INTEREST IN THERANOS THAT EXCEEDED WHATEVER
01:39PM 17 THE FAIR MARKET VALUE OF THERANOS WAS AT THE TIME THAT THEY
01:39PM 18 BOUGHT THAT INTEREST.

01:39PM 19 THE GOVERNMENT SAYS THAT VALUE WAS SOMETHING LESS THAN
01:39PM 20 WHAT THEY PAID AND THEY SUFFERED THROUGH A FRAUD.

01:39PM 21 WHAT IS THE JURY ENTITLED TO KNOW FROM THAT?

01:39PM 22 THE JURY IS ENTITLED TO KNOW THAT A PERCENTAGE OF THAT
01:39PM 23 LOSS ACTUALLY FLOWED TO MS. HOLMES THROUGH HER OWNERSHIP OF A
01:39PM 24 SUBSTANTIAL PORTION OF THE EQUITY IN THERANOS. THEY DON'T --
01:39PM 25 ACTUALLY THAT DOESN'T NEED TO REALLY BE ANALYZED FOR THEM. I

01:39PM 1 THINK OUR JURORS ARE SMART, AND THEY WILL FIGURE THAT OUT.

01:39PM 2 THAT'S THE BEGINNING AND THE END OF HOW EVIDENCE AROUND THESE
01:40PM 3 WEALTH ISSUES IS RELEVANT IN THE GOVERNMENT'S CASE.

01:40PM 4 AS I LISTENED TO MR. BOSTIC, IT IS ALMOST FRIGHTFUL TO ME
01:40PM 5 WHAT HE THINKS CAN BE ADVERTISED TO THE JURY ABOUT THIS WHILE
01:40PM 6 BY PUSHING THE CART OUT OF THE BARN BEFORE THE HORSE, WHICH WE
01:40PM 7 HAVE HEARD ABOUT OVER THE PAST FEW DAYS.

01:40PM 8 HE'S NOT ENTITLED IN OPENING TO ASSUME THAT THERE'S A
01:40PM 9 FRAUD AND THAT HE COULD COMMENT ON THE EVIDENCE IN THIS WAY
01:40PM 10 EITHER BY FEATURING IT OR PROMISING THAT IT WILL DEMONSTRATE
01:40PM 11 SOMETHING WHICH IT CAN NEVER BE USED TO DEMONSTRATE.

01:40PM 12 SO REALLY PART OF MY EMPHASIS HERE IS I THINK WE HAVE TO
01:40PM 13 LOOK VERY CLOSELY AT THE CASES THAT ALL OF THE PARTIES
01:40PM 14 RECOGNIZE ARE THE RELEVANT CASES.

01:40PM 15 NOW, HE ANSWERED YOUR HONOR BY SAYING THAT MS. HOLMES'S
01:40PM 16 SALARY IS THE RELEVANT, OR HER COMPENSATION FROM THE COMPANY IS
01:40PM 17 THE RELEVANT METRIC OR INDICATOR OF HOW MUCH SHE PROFITED.

01:41PM 18 AT THE TIME THAT MOST OF THE TRANSACTIONS THAT WE'RE
01:41PM 19 TALKING ABOUT TOOK PLACE MS. HOLMES'S SALARY WAS A COUPLE
01:41PM 20 HUNDRED THOUSAND DOLLARS A YEAR, GENEROUS MONEY TO BE SURE, BUT
01:41PM 21 NOT SOMETHING WHICH IN THIS CONTEXT IS UNUSUAL. AND, IN FACT,
01:41PM 22 IF ANYTHING, IT'S PROBABLY UNUSUAL IN BEING LESS THAN SOME OF
01:41PM 23 HER PEERS.

01:41PM 24 I THINK AFTER THE POINT IN TIME THAT MR. BOSTIC SUGGESTS
01:41PM 25 IS THE POINT IN TIME WHERE, QUOTE-UNQUOTE, "THE FRAUD WAS

DISCOVERED," THE BOARD OF DIRECTORS OF THERANOS VOTED TO INCREASE MS. HOLMES'S SALARY, NOT TO DECREASE IT.

SO I THINK HIS SORT OF CAVALIER ASSUMPTION THAT WE SHOULD BEGIN THIS CASE BY ASSUMING THERE WAS A FRAUD IS WHERE HE GOES OFF TRACK IN MULTIPLE WAYS.

IF I MIGHT COMMENT ON A FEW OTHER THINGS HE SAID BUT I'M HAPPY TO --

THE COURT: WELL, YOU KNOW, MR. DOWNEY, I WANTED YOU TO ANSWER MY QUESTION.

MR. DOWNEY: YES.

THE COURT: WHICH IS IF THERE WAS EVIDENCE THAT YOUR CLIENT SAID THAT I'M IN THIS NOT JUST FOR PERSONAL GAIN, I'M NOT IN IT AT ALL FOR THAT, IT'S PURELY ALTRUISTIC ON MY PART, I INTEND TO BENEFIT THE WORLD -- THE BETTERMENT OF THE WORLD THROUGH MY INVENTION IN WHAT OUR COMPANY DOES, DOES THAT THEN OPEN THE DOOR TO THIS TYPE OF INFORMATION, WELL, ACTUALLY, LADIES AND GENTLEMEN, SHE WASN'T BECAUSE SHE BENEFITTED GREATLY? SHE WENT TO X PLACES, SHE FLEW ON X AIRLINES, THOSE TYPES OF THINGS. WOULD THAT OPEN THE DOOR TO THAT?

MR. DOWNEY: I THINK WHAT IT WOULD OPEN THE DOOR TO IS WHAT I'VE ALREADY DESCRIBED. I THINK WE HAVE TO RECOGNIZE THAT WHEN AN INVESTOR DECIDED TO INVEST IN THERANOS, NOTIONALLY THERE WAS SOME BENEFIT TO MS. HOLMES.

NOW, SHE MAY HAVE BEEN ASKING FOR THAT INVESTMENT BECAUSE SHE WANTED TO GROW THIS COMPANY TO THE POINT WHERE IT WOULD

01:42PM 1 CHANGE THE WORLD. WE SUGGEST THE EVIDENCE MAY DEMONSTRATE
01:43PM 2 THAT.

01:43PM 3 NEVERTHELESS, AS A LEGAL MATTER, WHAT IS RELEVANT FOR A
01:43PM 4 FRAUD CLAIM IS, IS THERE SOME FINANCIAL LOSS TO THE INVESTOR
01:43PM 5 AND SOME FINANCIAL GAIN TO THE PERSON MAKING THE INVESTMENT?

01:43PM 6 I THINK, YOUR HONOR, THAT EVIDENCE IS RELEVANT TO STATE OF
01:43PM 7 MIND ISSUES, BUT IT'S ACTUALLY NOT RELEVANT TO THE ISSUE THAT
01:43PM 8 WE'RE DISCUSSING TODAY.

01:43PM 9 THE COURT: ALL RIGHT. AND I THINK IT SOUNDS LIKE
01:43PM 10 YOUR GRAVE CONCERN IS THAT THIS COMING IN AT OPENING.

01:43PM 11 MR. DOWNEY: WELL, FOR SURE, YOUR HONOR, BECAUSE I
01:43PM 12 THINK AS THE TRIAL PROGRESSES, I THINK IT WILL BE A LITTLE BIT
01:43PM 13 EASIER TO POLICE THIS, BUT I DON'T WANT SOMETHING THAT --
01:43PM 14 PERHAPS I LEFT SOME CONFUSION IN THE COURT'S MIND AS I DID IN
01:43PM 15 MR. BOSTIC'S MIND.

01:43PM 16 WE'RE ASKING FOR THE EXCLUSION OF THE EVIDENCE THAT IS
01:43PM 17 IDENTIFIED IN ITEM 21 OF THEIR 404(B) NOTICE. I WOULD
01:43PM 18 CERTAINLY BE HAPPY TO GO THROUGH THAT EVIDENCE IN MORE DETAIL,
01:44PM 19 BUT I DON'T THINK IT WOULD REALLY IMPROVE THE COURT'S
01:44PM 20 PERCEPTION OF THESE ISSUES OR YOUR ABILITY TO MAKE A DECISION.

01:44PM 21 THE COURT: ALL RIGHT. THANK YOU. MR. BOSTIC,
01:44PM 22 THANK YOU.

01:44PM 23 MR. BOSTIC: I HEARD ONE THING THAT MR. DOWNEY SAID
01:44PM 24 THAT I WOULD LIKE TO RESPOND TO FIRST. HE SAID THAT WHAT
01:44PM 25 MATTERS IN A FRAUD CLAIM, AND I'M PARAPHRASING, IS THE LOSS TO

01:44PM 1 THE VICTIM AND THE GAIN TO THE DEFENDANT.

01:44PM 2 THAT'S SIMPLY INCORRECT. AND THE CASE LAW CITED BY THE
01:44PM 3 DEFENSE ESTABLISHES THAT IT'S INCORRECT. IT'S NOT AN ELEMENT
01:44PM 4 OF A WIRE FRAUD CLAIM THAT THE GOVERNMENT PROVE LOSS TO THE
01:44PM 5 VICTIM OR PERSONAL GAIN BY THE DEFENDANT.

01:44PM 6 WHAT MATTERS IS THE DEFENDANT'S INTENT, AND MOTIVE IS
01:44PM 7 CLOSELY TIED INTO INTENT.

01:44PM 8 SO WHEN MR. DOWNEY SAYS THAT THE FOCUS NEED ONLY BE ON THE
01:44PM 9 TRANSACTIONS, WHAT CHECKS WERE WRITTEN BY WHICH INVESTORS AND
01:44PM 10 WHEN, AND THE MERE FACT THAT MS. HOLMES BENEFITTED FROM THAT BY
01:44PM 11 VIRTUE OF HER OWNERSHIP OF THE COMPANY, THAT MISSES THE POINT.
01:45PM 12 THIS IS NOT ABOUT ESTABLISHING LOSS TO THE VICTIMS. THIS IS
01:45PM 13 ABOUT EXPLAINING AND PROVIDING THE JURY WITH THE FACTS THAT
01:45PM 14 EXPLAIN THE DEFENDANT'S MOTIVE TO ENGAGE IN THIS FRAUD.

01:45PM 15 AND IT'S THAT EXACT MISUNDERSTANDING THAT HIGHLIGHTS THE
01:45PM 16 DANGER HERE OF HIDING THAT EVIDENCE FROM THE JURY. IF THE JURY
01:45PM 17 SEES ONLY THAT PEOPLE INVESTED IN THERANOS, IF THEY SEE ONLY
01:45PM 18 THAT THE DEFENDANT OWNED A PORTION OF THE COMPANY, IF THEY
01:45PM 19 HEAR, AS I'M SURE THE DEFENSE WILL WANT THEM TO KNOW, THAT
01:45PM 20 DEFENDANT NEVER CASHED OUT HER STOCK AND NEVER REAPED THE
01:45PM 21 WEALTH THAT SHE HAD ON PAPER, THE JURY COULD COME TO BELIEVE
01:45PM 22 THAT HER MOTIVATIONS FOR ENGAGING IN MISCONDUCT WERE SOMETHING
01:45PM 23 OTHER THAN PERSONAL ENRICHMENT, AND THAT'S SIMPLY NOT THE CASE
01:45PM 24 BECAUSE A FULL PICTURE OF THE BENEFITS THAT SHE OBTAINED BY
01:45PM 25 VIRTUE OF THE FRAUD SHOW THE OPPOSITE.

01:45PM 1 SO THE JURY ABSOLUTELY WILL HEAR ABOUT THE MONEY THAT
01:45PM 2 FLOWED FROM THE VICTIMS TO THERANOS, BUT THEY ALSO NEED TO
01:46PM 3 UNDERSTAND HOW THE MONEY THAT CAME TO THERANOS ACTUALLY
01:46PM 4 BENEFITTED THIS DEFENDANT INDIVIDUALLY BECAUSE AT THE END OF
01:46PM 5 THE DAY THE FOCUS IS ON HER MENTAL STATE. SO THAT'S WHY --

01:46PM 6 THE COURT: I ANTICIPATE, JUST LOOKING AT SOME OF
01:46PM 7 THE PLEADINGS THAT HAVE BEEN PRESENTED, I ANTICIPATE THAT THERE
01:46PM 8 IS GOING TO BE AT LEAST AN ATTEMPT TO INTRODUCE EVIDENCE OF
01:46PM 9 MS. HOLMES TALKING ABOUT THE COMPANY. AND I MIGHT SEE VIDEOS
01:46PM 10 OR SOMETHING, THOSE TYPES OF THINGS, WHERE SHE SPEAKS ABOUT
01:46PM 11 WHAT THIS TECHNOLOGY IS, THE ADVANTAGES OF IT, THE UNIQUENESS
01:46PM 12 OF IT, ET CETERA, ET CETERA, IN REGARDS TO THE MARKET.

01:46PM 13 AND I'M JUST CURIOUS IF THIS IS WHERE THIS IS GOING TO
01:46PM 14 COME IN, SHE WENT TO SO AND SO AND SHE TRAVELLED FIRST CLASS.

01:46PM 15 WE GET INTO THAT, MR. BOSTIC, AND I HAVE SOME CONCERNS
01:46PM 16 ABOUT DO WE REALLY NEED TO KNOW THE ITINERARY? WHAT IS THE
01:47PM 17 VALUE OF DID SHE STAY AT A FOUR SEASONS VIS-A-VIS A MOTEL 6? I
01:47PM 18 GUESS I HAVE SOME CONCERNS ABOUT THAT.

01:47PM 19 MR. BOSTIC: UNDERSTOOD, YOUR HONOR.

01:47PM 20 I THINK THERE CERTAINLY IS A LINE THAT SHOULD NOT BE
01:47PM 21 CROSSED WHEN DISCUSSING THIS KIND OF EVIDENCE. I THINK THERE'S
01:47PM 22 A POINT AT WHICH THE POINT HAS BEEN MADE AND THERE IS NOT NEED
01:47PM 23 TO HARP ON THESE DETAILS. IT IS CERTAINLY NOT THE GOVERNMENT'S
01:47PM 24 INTENTION TO MAKE THIS THE FOCUS AT TRIAL.

01:47PM 25 BUT THE JURY DOES NEED TO UNDERSTAND WHY SOMEONE WOULD DO

01:47PM 1 THIS, AND THE JURY NEEDS TO UNDERSTAND THE MOTIVE FOR THE
01:47PM 2 CHARGED FRAUD.

01:47PM 3 AND I UNDERSTAND MY COUNTERPART DOESN'T WANT TO ASSUME
01:47PM 4 THAT THERE IS A FRAUD HERE, BUT WE'RE TALKING ABOUT THE
01:47PM 5 GOVERNMENT'S CASE-IN-CHIEF.

01:47PM 6 THE COURT: WELL, IT HASN'T BEEN PROVEN YET.

01:47PM 7 MR. BOSTIC: I AM SORRY, YOUR HONOR?

01:47PM 8 THE COURT: SHE ENJOYS THE BENEFIT OF THE
01:47PM 9 PRESUMPTION OF INNOCENCE. THERE IS THAT.

01:47PM 10 MR. BOSTIC: EXACTLY, YOUR HONOR.

01:47PM 11 BUT THE GOVERNMENT IS ENTITLED TO PUT ON ITS CASE-IN-CHIEF
01:47PM 12 THAT WILL GIVE THE JURY THE EVIDENCE NECESSARY TO MAKE ITS OWN
01:47PM 13 DECISION, AND THAT'S WHAT TRIAL IS ALL ABOUT.

01:47PM 14 THE COURT: OF COURSE.

01:47PM 15 MR. BOSTIC: WITHOUT THAT EVIDENCE, THE JURY MIGHT
01:47PM 16 BE CONFUSED ABOUT WHY THE DEFENDANT ENGAGED IN MISCONDUCT, AND
01:48PM 17 THAT'S WHY I THINK IT'S IMPORTANT FOR THE JURY TO HAVE A FULL
01:48PM 18 PICTURE.

01:48PM 19 AND I WAS GOING THROUGH THE CATEGORIES BEFORE THAT THE
01:48PM 20 EVIDENCE THAT THE GOVERNMENT THINKS ARE RELEVANT HERE. WE
01:48PM 21 TALKED ABOUT COMPENSATION, STOCK IN THE COMPANY, THE PERKS THAT
01:48PM 22 WE WERE TALKING ABOUT, NOT THE MOST IMPORTANT CATEGORY, BUT IT
01:48PM 23 ALSO -- THOSE ITEMS ARE RELEVANT TO THE DEFENDANT'S DECISION
01:48PM 24 NOT TO CASH IN HER STOCK AND ENRICH HERSELF FURTHER. THE PERKS
01:48PM 25 SHE WAS ENJOYING AS A RESULT OF HER POSITION AT THIS COMPANY,

01:48PM 1 WHOSE SUCCESS HAD BEEN BOLSTERED BY THE FRAUD, THE PERKS THAT
01:48PM 2 SHE WAS ENJOYING GREATLY REDUCE THE PRESSURE ON HER TO CASH IN,
01:48PM 3 SELL STOCK, AND MAKE MORE MONEY.

01:48PM 4 SO THEY ALSO -- THESE DETAILS PROVIDE A RESPONSE TO
01:48PM 5 EVIDENCE THAT THE DEFENDANT CHOSE NOT TO CASH IN HER STOCK,
01:48PM 6 CHOSE NOT TO ASK FOR A GREATER SALARY. SO, AGAIN, NECESSARY TO
01:48PM 7 GIVE THE JURY THE COMPLETE PICTURE.

01:48PM 8 THE FINAL CATEGORY THAT WE HAVEN'T TALKED ABOUT, BUT IT'S
01:49PM 9 MENTIONED IN THE DEFENDANT'S BRIEF, IS LIFESTYLE EVIDENCE FOR
01:49PM 10 LACK OF A BETTER WORD.

01:49PM 11 THE GOVERNMENT SHOULD BE ENTITLED TO PUT IN EVIDENCE OF
01:49PM 12 THE INTANGIBLE BENEFITS THAT THE DEFENDANT REAPED FROM THE
01:49PM 13 FRAUD. SPECIFICALLY, THE INCREASED CACHET AND POPULARITY THAT
01:49PM 14 SHE OBTAINED FROM BEING CEO OF THE COMPANY WHO'S REPUTATION HAS
01:49PM 15 BEEN ARTIFICIALLY INFLATED BY THE MISREPRESENTATIONS IN THIS
01:49PM 16 CASE. THAT DOES NOT HAVE TO DO WITH HOW SHE SPENT HER MONEY.
01:49PM 17 SO THIS IS NOT CONTRARY TO THE CASE LAW CITED BY THE DEFENDANT.

01:49PM 18 THE COURT: THAT SEEMS A LITTLE INTANGIBLE, DOESN'T
01:49PM 19 IT, HOW POPULAR SHE WAS? IS THIS A -- YOU KNOW, HOW DO YOU
01:49PM 20 GAUGE THAT? HOW DOES THAT MEASURE? WHAT ARE THE METRICS FOR
01:49PM 21 THAT?

01:49PM 22 MR. BOSTIC: SO I DON'T KNOW IF THERE ARE NUMBERS
01:49PM 23 THAT COULD BE ATTACHED TO IT, YOUR HONOR.

01:49PM 24 BUT, FOR EXAMPLE, THE FACT THAT THE DEFENDANT WAS A
01:49PM 25 SUBJECT OF A MOUNTAIN OF FAVORABLE PUBLICITY IS A FACT THAT

01:50PM 1 SHOULD BE PUT IN FRONT OF THE JURY, AND WE'LL TALK ABOUT THAT.
01:50PM 2 NEWS ARTICLES TO A CERTAIN EXTENT. BUT FAVORABLE PUBLICITY,
01:50PM 3 FAVORABLE REPUTATION.

01:50PM 4 TO THE EXTENT THAT THE DEFENDANT RECEIVED -- BECAME A
01:50PM 5 CELEBRITY IN SILICON VALLEY, TO THE EXTENT SHE MET DIGNITARIES,
01:50PM 6 POLITICIANS AND OTHER BUSINESS LEADERS AS A RESULT, THESE
01:50PM 7 THINGS WERE TRULY WERE BENEFITS, INTANGIBLE, BUT BENEFITS
01:50PM 8 NONETHELESS OF THE FRAUDULENT SCHEME.

01:50PM 9 SO IF THE JURY IS ENTITLED TO KNOW ABOUT EVIDENCE RELEVANT
01:50PM 10 TO INTENT, THE JURY SHOULD BE ENTITLED TO KNOW ABOUT THOSE
01:50PM 11 INTANGIBLE BENEFITS AS WELL THAT THE DEFENDANT REAPED FROM THE
01:50PM 12 FRAUD.

01:50PM 13 THE COURT: OKAY.

01:50PM 14 MR. DOWNEY: I MUST SAY MR. BOSTIC'S COMMENTS
01:50PM 15 CONCERN ME. I ACTUALLY EXPECTED THAT WHEN I MADE CLEAR THAT WE
01:50PM 16 HAVE NO OBJECTIONS TO THE DETAILS OF THESE TRANSACTIONS BEING
01:50PM 17 ADMITTED THAT HE WOULD BE SATISFIED, BECAUSE AFTER ALL, HE HAS
01:50PM 18 AVAILABLE TO HIM THE ARGUMENT THAT SHE WOULD HAVE ACHIEVED
01:51PM 19 SUBSTANTIAL FINANCIAL GAIN FROM THESE INVESTMENTS.

01:51PM 20 LET ME TELL YOU WHERE WE ARE THAT CONCERNS ME ABOUT WHAT
01:51PM 21 MR. BOSTIC JUST SAID. WE DON'T HAVE EVIDENCE IN THE RECORD
01:51PM 22 FROM THE GOVERNMENT AS TO WHO PAID FOR THE BENEFITS THAT
01:51PM 23 MR. BOSTIC IS DESCRIBING. WE DON'T HAVE A QUANTIFICATION OF
01:51PM 24 FAME OR CELEBRITY OR OTHER TABLOID TYPE OF COMMENTARY. NONE OF
01:51PM 25 THIS DO WE HAVE OTHER THAN EMAILS DISCUSSING LUXURY ITEMS,

01:51PM 1 WHICH DISCUSS A LOT OF OTHER THINGS AS WELL, AND IT'S BEING PUT
01:51PM 2 IN FRONT OF THE JURY AND THE GOVERNMENT'S PROPOSAL TO ESTABLISH
01:51PM 3 THAT SHE WAS ILL-MOTIVATED BY A DESIRE FOR LUXURY AND A DESIRE
01:51PM 4 FOR FAME.

01:51PM 5 I THINK IT'S A VERY DANGEROUS AREA AND PARTICULARLY ODD
01:51PM 6 ONE FOR THE GOVERNMENT TO ENTER WHEN THE ARGUMENTS THAT ARE
01:51PM 7 AVAILABLE TO IT UNDER CERTAIN SCENARIOS ARE THERE TO BE TAKEN.

01:51PM 8 MR. BOSTIC: YOUR HONOR, JUST BRIEFLY ON ONE OF
01:52PM 9 THOSE POINTS.

01:52PM 10 IT'S NOT THE CASE THAT THERE IS NO EVIDENCE ABOUT WHO PAID
01:52PM 11 FOR THE BENEFITS THAT THE GOVERNMENT IS REFERENCING. FOR
01:52PM 12 EXAMPLE, AS TO TRAVEL, WITNESSES HAVE INFORMED THE GOVERNMENT
01:52PM 13 THAT THE COMPANY PAID FOR HOLMES'S TRAVEL.

01:52PM 14 SO THE FACT THAT THIS DEFENDANT TRAVELLED ON PRIVATE JETS,
01:52PM 15 FOR EXAMPLE, THE GOVERNMENT'S UNDERSTANDING BASED ON WITNESS
01:52PM 16 STATEMENTS IS THAT THAT WAS NOT PAID FOR BY THE DEFENDANT
01:52PM 17 INDIVIDUALLY BUT PAID FOR BY THE COMPANY. SO THAT SHOULD BE
01:52PM 18 VIEWED AS PART OF HER COMPENSATION, PART OF THE BENEFITS SHE
01:52PM 19 REAPED.

01:52PM 20 THE COURT: IS THERE A 403 ANALYSIS THAT I SHOULD
01:52PM 21 LOOK AT HERE AS WELL, MR. BOSTIC?

01:52PM 22 MR. BOSTIC: SO, YOUR HONOR, TWO POINTS THERE.

01:52PM 23 I THINK THE QUANTITY OF THE EVIDENCE MATTERS, OR
01:52PM 24 POTENTIALLY MATTERS FOR 403 PURPOSES, AND I STATED BEFORE THE
01:52PM 25 GOVERNMENT'S COMMITMENT NOT TO BELABOR THIS POINT.

01:52PM 1 MR. DOWNEY'S POINT THAT IN THE GRAND SCHEME OF THINGS THE
01:52PM 2 DEFENDANT'S SALARY WAS RELATIVELY MODEST OR CERTAINLY COULD
01:52PM 3 HAVE BEEN MORE ARGUABLY REDUCES THE RISK OF PREJUDICE IN THIS
01:53PM 4 CASE.

01:53PM 5 THE FACT THAT SHE DIDN'T CASH IN HER STOCK FROM THE
01:53PM 6 COMPANY ARGUABLY REDUCES THE PREJUDICE FROM THE JURY KNOWING
01:53PM 7 ABOUT THAT AMOUNT.

01:53PM 8 AND SO I THINK GIVEN THE PROBATIVE VALUE OF THIS EVIDENCE,
01:53PM 9 THE FACT THAT WITHOUT IT THE JURY TRULY WILL HAVE AN INCOMPLETE
01:53PM 10 PICTURE OF THE MOTIVE IN THIS CASE AND WHY SOMEONE WOULD HAVE
01:53PM 11 ENGAGED IN THIS CONDUCT. GIVEN THAT PROBATIVE VALUE, I THINK
01:53PM 12 THE POTENTIAL PREJUDICIAL VALUE IS EASILY OUTWEIGHED.

01:53PM 13 THE COURT: MR. DOWNEY, I KNOW YOUR POSITION IS
01:53PM 14 DON'T LET ANY OF IT IN, BUT IF THE COURT IS LOOKING AT THIS,
01:53PM 15 SHOULD I LOOK THROUGH A 403 LENS?

01:53PM 16 MR. DOWNEY: YOUR HONOR, I THINK YOU SHOULD,
01:53PM 17 PARTICULARLY IN THE FORM OF WHICH IT'S PRESENTED.

01:53PM 18 TO THE EXTENT THAT EXPENSE INFORMATION INCURRED BY A
01:53PM 19 COMPANY HAS COME INTO A CASE, IT'S TYPICALLY COME IN, IN THE
01:53PM 20 FORM WHERE A LEDGER FROM THE COMPANY IS CONSULTED, THE AMOUNT
01:53PM 21 OF THE EXPENSE IS LOOKED AT. YOU CAN VERIFY FROM THAT WHETHER
01:53PM 22 IT WAS A CORPORATE EXPENSE OR NOT AND THEN WHETHER IT WAS A
01:54PM 23 LEGITIMATE CORPORATE OFFENSE OR NOT CAN BE DEBATED.

01:54PM 24 THERE'S NO QUESTION THAT THE WITNESSES WHO MR. BOSTIC
01:54PM 25 REFERENCES WILL TELL THIS JURY THAT MS. HOLMES WAS TRAVELLING

01:54PM 1 ALMOST EXCLUSIVELY ON COMPANY BUSINESS MUCH OF WHICH WAS NOT
01:54PM 2 ONLY ENCOURAGED BY THE BOARD BUT ARRANGED BY THE BOARD OF
01:54PM 3 DIRECTORS OF THIS ENTITY.

01:54PM 4 FOR US TO HAVE TO REBUT ALL OF THAT IS NOT ONLY PUTTING IN
01:54PM 5 FRONT OF THE JURY HIGHLY PREJUDICIAL EVIDENCE, BUT IT'S PUTTING
01:54PM 6 EVIDENCE BEFORE THE JURY THAT IS HIGHLY WASTEFUL OF THE JURY
01:54PM 7 AND COURT'S TIME. SO I THINK THERE ARE SEVERAL SEPARATE 403
01:54PM 8 ISSUES THAT I THINK YOU HAVE TO LOOK AT.

01:54PM 9 THE COURT: ALL RIGHT.

01:54PM 10 MR. BOSTIC: YOUR HONOR, JUST TO CLARIFY THERE
01:54PM 11 BRIEFLY. I THINK THAT MISAPPREHENDS THE PURPOSE FOR WHICH THE
01:54PM 12 EVIDENCE IS INTRODUCED. THERE'S NOT GOING TO BE ANY
01:54PM 13 INSINUATION BY THE GOVERNMENT THAT THESE TRIPS, FOR EXAMPLE,
01:54PM 14 WERE IMPROPER OR THAT THE BOARD DIDN'T AUTHORIZE THEM. THAT'S
01:55PM 15 NOT WHAT THIS CASE IS ABOUT.

01:55PM 16 BUT TO SAY THAT TRAVEL ON A PRIVATE JET, STAYING AT LUXURY
01:55PM 17 HOTELS, RECEIVING FAVORABLE ATTENTION FROM DIGNITARIES AND
01:55PM 18 POLITICIANS AND OTHER PROMINENT INDIVIDUALS, TO SAY THAT THESE
01:55PM 19 THINGS ARE NOT BENEFITS AND TO SAY THAT THEY DIDN'T FLOW FROM
01:55PM 20 WHAT THE GOVERNMENT ALLEGES TO BE A FRAUD SIMPLY DOESN'T HOLD
01:55PM 21 WATER.

01:55PM 22 THE COURT: OKAY.

01:55PM 23 MR. DOWNEY: WHAT MR. BOSTIC JUST SAID DECIDES THIS
01:55PM 24 MOTION FOR YOU, YOUR HONOR. THE HOLDING OF THE REYES CASE IS
01:55PM 25 THAT WEALTH WHICH IS LEGITIMATELY INCURRED, AUTHORIZED WEALTH,

01:55PM 1 CANNOT BE USED TO ARGUE THAT A DEFENDANT ENGAGED IN CRIMINAL
01:55PM 2 ACTIVITY.

01:55PM 3 WHAT HE JUST SAID IS ACCURATE, AND IT PLACES THIS CASE
01:55PM 4 SQUARELY WITHIN REYES AND MITCHELL.

01:55PM 5 MR. BOSTIC: I'M HAPPY TO RESPOND, YOUR HONOR,
01:55PM 6 OTHERWISE SUBMITTED.

01:55PM 7 THE COURT: THANK YOU BOTH.

01:55PM 8 MR. DOWNEY: THANK YOU.

01:55PM 9 THE COURT: THANK YOU VERY MUCH. THIS WILL BE UNDER
01:55PM 10 SUBMISSION. THANK YOU BOTH. AN ORDER WILL COME OUT WITH THE
01:55PM 11 OTHER MOTIONS.

01:55PM 12 NEXT IS DOCKET 566 AND 576, AND I BELIEVE THESE ARE
01:56PM 13 MS. HOLMES'S MOTIONS TO EXCLUDE EVIDENCE OF THERANOS'S TRADE
01:56PM 14 SECRETS PRACTICES AND EVIDENCE REGARDING THIRD PARTY TESTING
01:56PM 15 PLATFORMS.

01:56PM 16 GOOD AFTERNOON. ARE YOU ANDREW LEMENS?

01:56PM 17 MR. LEMENS: I AM ANDREW LEMENS.

01:56PM 18 THE COURT: I HAVE A POST-IT HERE THAT SOMEBODY GAVE
01:56PM 19 ME, AND I THINK THIS IS TO INTRODUCE YOU. I GUESS THEY WERE
01:56PM 20 SAYING I NEED POST-ITS BECAUSE I WILL CONFUSE MR. DOWNEY AND
01:56PM 21 MR. WADE.

01:56PM 22 MR. LEMENS: I'M NOT GOING TO COMMENT ON THAT,
01:56PM 23 YOUR HONOR. IT'S VERY NICE TO SEE YOU IN PERSON.

01:56PM 24 THE COURT: THANK YOU. THAT'S A CONVERSATION FOR
01:56PM 25 THEM ON THE FLIGHT HOME.

01:56PM 1 MR. LEMENS: YOUR HONOR, ANDREW LEMENS FOR
01:56PM 2 ELIZABETH HOLMES.

01:56PM 3 THE COURT: THANK YOU.

01:56PM 4 MR. LEMENS: I WILL BE ADDRESSING BOTH MOTIONS. THE
01:56PM 5 MOTION TO EXCLUDE EVIDENCE OF THERANOS'S TRADE SECRETS
01:56PM 6 PRACTICES, WHICH IS DOCKET 566; AND MOTION TO EXCLUDE CERTAIN
01:56PM 7 EVIDENCE RELATING TO THE MODIFIED DEVICES, WHICH IS 576.

01:56PM 8 I WAS GOING TO PROPOSE, YOUR HONOR, THAT WE TAKE THESE
01:56PM 9 SEPARATELY. THERE ARE SOME OVERLAPPING ISSUES, BUT I THINK
01:57PM 10 DEALING WITH THE TRADE SECRETS CASE FIRST AND TRY AND CLEAN UP
01:57PM 11 WITH THE DEVICES.

01:57PM 12 THE COURT: WELL, LET'S TALK ABOUT THE TRADE SECRETS
01:57PM 13 FIRST. WE'RE IN SILICON VALLEY HERE, AND THERE ARE LOTS OF
01:57PM 14 THEM HERE.

01:57PM 15 MR. LEMENS: I WILL NOT PRESUME TO -- I UNDERSTAND
01:57PM 16 YOUR HONOR IS PROBABLY DEEPLY FAMILIAR WITH THESE ISSUES, AND I
01:57PM 17 DON'T KNOW IF YOU HAVE ANYTHING SPECIFIC THAT YOU WANTED TO GET
01:57PM 18 INTO, OTHERWISE I COULD PROVIDE SOME --

01:57PM 19 THE COURT: I THINK THE GOVERNMENT -- MR. LEACH, ARE
01:57PM 20 YOU SPEAKING FOR THE GOVERNMENT? OH, I AM SORRY. MR. SCHENK.

01:57PM 21 I SUPPOSE WHEN I STARTED THIS, MR. SCHENK, I LOOKED AT THE
01:57PM 22 PLEADINGS AND I -- YES, MAYBE YOU BETTER COME UP. THANK YOU.

01:57PM 23 I WAS LOOKING AT THIS AND I WAS THINKING WE KNOW ABOUT
01:57PM 24 TRADE SECRETS, ALL OF US DO. WE ALL HAVE FAMILIARITY WITH
01:57PM 25 THEM. I SUPPOSE I'M TRYING TO DISCERN WHAT ARE THE -- WHAT IS

01:57PM 1 DIFFERENT ABOUT WHAT THIS COMPANY DID TO GUARD AS THEY'RE
01:57PM 2 REQUIRED TO DO, THE LAW REQUIRES COMPANIES TO PROTECT THEIR
01:58PM 3 PROPRIETARY SECRETS, AND WHAT IS DIFFERENT FROM WHAT THERANOS
01:58PM 4 DID THAT OTHER COMPANIES ARE DOING?

01:58PM 5 AND I DON'T MEAN, MR. LEMENS, TO CUT YOU OFF. IF YOU WANT
01:58PM 6 TO SAY SOME WORDS ON THIS, PLEASE DO. BUT THIS IS THE AREA AT
01:58PM 7 LEAST INITIALLY WHERE I THOUGHT MY THOUGHTS AND CONVERSATION
01:58PM 8 WOULD BE HELPFUL.

01:58PM 9 BUT DO YOU WANT TO ADD SOMETHING TO THIS, MR. LEMENS?

01:58PM 10 MR. LEMENS: NO. I THINK YOUR HONOR IDENTIFIED THE
01:58PM 11 ISSUE THAT WE'RE CONCERNED ABOUT, AND THAT'S THAT THERE IS A
01:58PM 12 LARGE AMOUNT OF CONDUCT IN THE GOVERNMENT'S 404(B) NOTICE AS TO
01:58PM 13 THESE THREE CATEGORIES, WHICH ALL ARE ROOTED IN TRADE SECRETS
01:58PM 14 PRACTICES, THAT IS, THE INNOCUOUS OR INNOCENT CONDUCT THAT THE
01:58PM 15 NINTH CIRCUIT HAS WARNED NOT TO INTRODUCE INTO CRIMINAL CASES
01:58PM 16 IN THIS MANNER.

01:58PM 17 THE GOVERNMENT TO DATE HAS IGNORED A LARGE SEGMENT OF ITS
01:58PM 18 404(B) NOTICE IN BRIEFING THIS MOTION. THEY'VE GONE FROM 30 OR
01:59PM 19 MORE VIGNETTES THAT THEY SOUGHT TO INTRODUCE AT TRIAL TO 3 THAT
01:59PM 20 ARE ADDRESSED IN THEIR BRIEF, AND I THINK THE GOVERNMENT SHOULD
01:59PM 21 BE LIMITED TO THOSE THREE IF THEY COME IN AT ALL.

01:59PM 22 I THINK OUR CONCERN, YOUR HONOR, IS NORMALLY IN THESE
01:59PM 23 CASES, AND I BELIEVE THIS IS TRUE UNDER THE CIVIL CONTEXT AND I
01:59PM 24 WOULD EXPECT THE SAME HERE, YOU WOULD EXPECT TO SEE SOMEONE
01:59PM 25 WITH EXPERTISE IN CORPORATE PRACTICES, IN THE INDUSTRY, IN

01:59PM 1 TRADE SECRETS TO COME DRAW THE LINE BETWEEN WHAT IS PROPER AND
01:59PM 2 IMPROPER CONDUCT.

01:59PM 3 AND WE DON'T HAVE THAT HERE. THERE'S NO EVIDENCE OR NO
01:59PM 4 DISCLOSURE OF SOMEONE WHO WOULD HELP THE JURY UNDERSTAND IF AND
01:59PM 5 TO WHAT EXTENT THE COMPANY CROSSED A LINE OR WENT BEYOND WHAT
01:59PM 6 WOULD BE CONSIDERED REASONABLE MEASURES.

01:59PM 7 OUR CONCERN IS THAT WITHOUT THAT, IT'S UNCLEAR HOW THAT
01:59PM 8 COMES IN. SO THAT'S ISSUE ONE.

01:59PM 9 ISSUE TWO, I THINK WHAT THE GOVERNMENT IS TRYING TO SET UP
01:59PM 10 HERE IS TO PUT MS. HOLMES WITH THE BURDEN OF MAKING THAT
02:00PM 11 DISTINCTION. THE ONLY EVIDENCE THAT SHOULD COME IN IS TO THE
02:00PM 12 EXTENT THAT A PRACTICE OR CONDUCT WAS IMPROPER.

02:00PM 13 THE GOVERNMENT HAS INDICATED IT WANTS TO INTRODUCE
02:00PM 14 STATEMENTS THAT THE COMPANY WAS VERY SECRETIVE OR HAD A SILO
02:00PM 15 CULTURE OR WAS MORE SECRETIVE THAN WHAT A PARTICULAR WITNESS
02:00PM 16 WOULD THINK. THAT'S NOT ENOUGH TO THEN LEAVE IT TO THE DEFENSE
02:00PM 17 TO FORCE US TO TAKE ON THE BURDEN OF DISTINGUISHING WHAT WAS
02:00PM 18 PROPER CONDUCT AND WHAT WAS NOT. I THINK IT FALLS TO THE
02:00PM 19 GOVERNMENT, IF THEY WANT TO INTRODUCE THIS EVIDENCE, TO SHOW
02:00PM 20 THIS IS THE LEGITIMATE CONDUCT. AND THIS IS WHERE WE THINK
02:00PM 21 THEY CROSS THE LINE.

02:00PM 22 THE COURT: OKAY. MR. SCHENK. THANK YOU.

02:00PM 23 MR. SCHENK: A FEW THOUGHTS. FIRST, TO BEGIN BY
02:00PM 24 ANSWERING THE COURT'S QUESTION, WHICH AS I UNDERSTAND IT IS
02:00PM 25 THAT IF THIS IS NORMAL SILICON VALLEY TRADE SECRET PROTECTION

02:00PM 1 PRACTICES, THEN WHAT IS THE RELEVANCE OF THE EVIDENCE? WHY
02:01PM 2 ALLOW THE JURY TO HEAR THAT?

02:01PM 3 AND THE ANSWER REALLY IS TWO THINGS: FIRST, IT'S -- LET'S
02:01PM 4 ASSUME FOR A MOMENT THAT CATEGORIES 7, 8, AND 12, WHICH ARE THE
02:01PM 5 CATEGORIES AT ISSUE HERE, INCLUDE DISCUSSIONS OF WHAT THE
02:01PM 6 DEFENSE CALLS ROUTINE TRADE SECRET PROTECTION PRACTICES, THE
02:01PM 7 GOVERNMENT HAS A DIFFERENT VERSION OF THAT, TOO.

02:01PM 8 THE GOVERNMENT'S VERSION IS THERANOS'S USE OF THE
02:01PM 9 NONDISCLOSURE AGREEMENTS WAS VERY AGGRESSIVE. THERANOS'S USE
02:01PM 10 OF SILOING INFORMATION WAS VERY AGGRESSIVE. THERANOS'S USE OF
02:01PM 11 HIDING INFORMATION WITHIN THE FOUR WALLS OF THERANOS FROM
02:01PM 12 CERTAIN EMPLOYEES WAS DONE TO PROTECT THAT INFORMATION FROM
02:01PM 13 GETTING OUT.

02:01PM 14 AGAIN, THE GOVERNMENT'S THEORY IS THAT THIS COMPANY WAS
02:02PM 15 COMMITTING FRAUD AND AS A RESULT THEY HAD TO USE CERTAIN
02:02PM 16 TACTICS THAT THEY'RE NOW SAYING WERE TRADE SECRET PRACTICES BUT
02:02PM 17 WERE, IN FACT, DONE TO PREVENT THE DISCOVERY OF THE FRAUD, AND
02:02PM 18 I CAN GIVE A COUPLE OF EXAMPLES.

02:02PM 19 IN THE SILOING CONTEXT, IT'S IMPORTANT THAT WE TALK ABOUT
02:02PM 20 THE TIMING OF THAT. THE GOVERNMENT HAS INTERVIEWED FORMER
02:02PM 21 EMPLOYEES WHO SAY DURING, WHAT IN SOME BRIEFING BEFORE THE
02:02PM 22 COURT HAS BEEN DESCRIBED AS THE STEALTH PHASE, WHEN THERANOS
02:02PM 23 WAS MUCH MORE SECRETIVE, LET'S SAY THE FIRST 10 YEARS OF ITS
02:02PM 24 EXISTENCE, THERE WAS MUCH MORE FREE FLOW OF INFORMATION BY THE
02:02PM 25 EMPLOYEES WHEN THERANOS -- WHICH IS COUNTERINTUITIVE. THEY

02:02PM 1 WERE DEEMED SECRETIVE AND YET WITHIN THE COMPANY YOU COULD
02:02PM 2 DISCUSS WITH YOUR COLLEAGUES, YOUR KEY CARD COULD GIVE YOU
02:02PM 3 ACCESS TO LOTS OF DIFFERENT ROOMS. WHEN THERANOS PIVOTED, WHEN
02:02PM 4 THERANOS BECAME MORE AGGRESSIVE IN SEEKING PUBLIC ATTENTION,
02:02PM 5 IT, IN FACT, IMPOSED MANY OF THESE SILOS. IT PREVENTED CERTAIN
02:03PM 6 EMPLOYEES FROM TALKING TO OTHER EMPLOYEES. IT PREVENTED
02:03PM 7 CERTAIN EMPLOYEES FROM GETTING ACCESS TO CERTAIN LABS IN THE
02:03PM 8 BUILDING.

02:03PM 9 AND THE REASON IT DID THAT IS BECAUSE WHAT THEY WERE
02:03PM 10 TELLING TO THE WORLD, WHAT THEY WERE TELLING TO THE PUBLIC WAS
02:03PM 11 DIFFERENT THAN THE TRUTH WITHIN THE COMPANY.

02:03PM 12 AND AT THE TIME THERANOS WAS HIDING BEHIND TRADE SECRET
02:03PM 13 PRACTICES. WE CAN'T TELL YOU MORE INFORMATION ABOUT WHAT WE'RE
02:03PM 14 DOING BECAUSE IT'S TRADE SECRET.

02:03PM 15 THE COURT: SO THIS IS -- I'M SORRY TO INTERRUPT
02:03PM 16 YOU, MR. SCHENK. SO THIS WILL BE TIME STAMPED, THE PROSECUTION
02:03PM 17 WILL TIME STAMP THE BEHAVIOR WITH SOMETHING ELSE THAT
02:03PM 18 THERANOS -- PERHAPS THE INABILITY, FROM YOUR POSITION, THE
02:03PM 19 INABILITY FOR THEM TO CONTINUE TO PRODUCE ACCURATE TESTING.
02:03PM 20 AND AS THAT STARTED TO UNFOLD AS WE'VE KNOWN FROM THE
02:03PM 21 ALLEGATIONS IN THE BRIEFING HERE, THE GOVERNMENT'S POSITION
02:03PM 22 HERE IS THAT'S WHEN THE SECRECY BECAME TIGHTER, TIGHTER OR THE
02:04PM 23 WAGON CIRCLED CLOSER.

02:04PM 24 MR. SCHENK: YES, YOUR HONOR.

02:04PM 25 WHEN EVIDENCE OF THIS NATURE COMES IN AT TRIAL, LARGELY

02:04PM 1 EITHER THROUGH WITNESS TESTIMONY OR EMAILS, INTERNAL COMPANY
02:04PM 2 EMAILS, IT WILL BE DISCUSSING A PRACTICE AT A PARTICULAR TIME
02:04PM 3 AT THERANOS IN THE SORT OF DEVELOPMENT OR EVOLUTION OF THE
02:04PM 4 BUSINESS.

02:04PM 5 AND YOU CAN'T SAY, AS THE DEFENSE WANTS TO RIGHT NOW, ALL
02:04PM 6 OF THE PRACTICES WERE TRADE SECRET PROTECTION PRACTICES, AND,
02:04PM 7 THEREFORE, INAPPROPRIATE FOR THE JURY TO HEAR BECAUSE THAT'S
02:04PM 8 SIMPLY NOT TRUE. THAT'S THE EXACT ARGUMENT THAT THEY MADE AT
02:04PM 9 THE TIME TO HIDE INFORMATION FROM THE PUBLIC TO PREVENT THE
02:04PM 10 DISCOVERY OF THE FRAUD. I'M SORRY, WE CAN'T TELL YOU ANYTHING
02:04PM 11 ABOUT THE USE OF THIRD PARTY DEVICES BECAUSE THAT'S TRADE
02:04PM 12 SECRET PRACTICES.

02:04PM 13 IN FACT, THEY USE THAT SAME ARGUMENT THAT THEY'RE
02:04PM 14 PRESENTING NOW TO THE COURT TO PREVENT INVESTORS FROM LEARNING
02:04PM 15 MORE ABOUT WHAT WAS ACTUALLY OCCURRING AT THERANOS.

02:05PM 16 THERE ARE STORIES THAT ARE CITED IN THE GOVERNMENT'S
02:05PM 17 BRIEFING TO THE COURT ABOUT INDIVIDUALS COMING TO THERANOS,
02:05PM 18 THEN-VICE PRESIDENT BIDEN, AND DURING A VISIT THERE WERE
02:05PM 19 THERANOS TSP'S, THE THERANOS BOXES SET UP TO MAKE IT APPEAR
02:05PM 20 THAT THAT'S WHAT THEY USED TO TEST THE BLOOD.

02:05PM 21 THERE'S A SIMILAR STORY THAT IS PRESENTED IN THE
02:05PM 22 GOVERNMENT'S BRIEFING REGARDING INTERACTIONS THAT MS. HOLMES
02:05PM 23 HAD WITH ROGER PARLOFF, A REPORTER, WHERE MR. PARLOFF ASKED TO
02:05PM 24 VIEW A LAB AND IS TOLD, "REMEMBER WHEN YOU SAW THE ROOM WITH
02:05PM 25 ALL OF THE THERANOS BOXES IN IT, YOU ESSENTIALLY SAW THEM."

02:05PM 1 SO TO NOW SAY IT WOULD BE UNFAIR FOR THE GOVERNMENT AT
02:05PM 2 TRIAL TO GET TO INTRODUCE EVIDENCE OF HIDING THE LAB, OF
02:05PM 3 KEEPING TIGHT REINS AROUND THE LAB IS, AGAIN, FEEDING THE SAME
02:05PM 4 KIND OF ARGUMENTS THAT WERE USED AT THE TIME TO PREVENT
02:06PM 5 DISCLOSURE OF WHAT WAS ACTUALLY GOING ON AT THERANOS.

02:06PM 6 AND IT IS REASONABLE FOR THE JURY TO GET TO MAKE THEIR OWN
02:06PM 7 DETERMINATION ON THIS FACT ISSUE.

02:06PM 8 IS IT ACTUALLY REASONABLE TRADE SECRET PRACTICES AS THE
02:06PM 9 DEFENSE WANTS TO SAY IT IS OR WERE THESE EFFORTS TAKEN TO
02:06PM 10 FURTHER THE FRAUD? DO THEY DEMONSTRATE THE INTENT? DO THEY
02:06PM 11 DEMONSTRATE KNOWLEDGE OF THE INTENT?

02:06PM 12 THE COURT: SO, MR. LEMENS, IS THIS JUST FACT
02:06PM 13 EVIDENCE?

02:06PM 14 MR. LEMENS: I THINK THAT'S AN ENTIRELY NEW ARGUMENT
02:06PM 15 FROM THE GOVERNMENT, YOUR HONOR. SO BEAR WITH ME, AND I'LL TRY
02:06PM 16 TO SORT THROUGH THAT. I DON'T THINK THIS IS SOMETHING THAT WE
02:06PM 17 HAVE HEARD BEFORE.

02:06PM 18 AS TO SPECIFIC EXAMPLES THAT MR. SCHENK NOTED, THE
02:06PM 19 GOVERNMENT HAS PREVIOUSLY INDICATED THAT IT WOULD NOT PURSUE
02:06PM 20 THE NARRATIVE THAT IT PREVIOUSLY DISCLOSED WITH RESPECT TO THEN
02:06PM 21 VICE PRESIDENT BIDEN. IF THAT'S BACK ON THE TABLE, I DON'T
02:07PM 22 KNOW, BUT I THINK WE NEED SOME CLARITY AS TO WHAT THE EVIDENCE
02:07PM 23 IS.

02:07PM 24 WITH RESPECT TO MR. PARLOFF, THAT'S CERTAINLY SOMETHING
02:07PM 25 THAT THE GOVERNMENT COULD HAVE CONTESTED IN ITS BRIEF. IT DID

02:07PM 1 NOT.

02:07PM 2 BUT MORE BROADLY, THIS IDEA THAT IT CHANGES OVER TIME,
02:07PM 3 THIS IDEA THAT THERE ARE IMPROPER USE OF TRADE SECRETS
02:07PM 4 PRACTICES CALLS FOR THE EXPERT TESTIMONY OF SOMEONE OF
02:07PM 5 KNOWLEDGE AND EXPERTISE IN THAT FIELD, AND THE GOVERNMENT
02:07PM 6 DOESN'T HAVE THAT. AND HE HAS NO -- MY COLLEAGUE HAS NO
02:07PM 7 RESPONSE TO THAT.

02:07PM 8 AND I DON'T THINK IT'S FAIR TO SAY WE'LL JUST LET THE JURY
02:07PM 9 DETERMINE WHAT WAS A REASONABLE PRACTICE.

02:07PM 10 WE'RE LOOKING BACK IN TIME. THESE PRACTICES CHANGE OVER
02:07PM 11 TIME. I THINK -- I'LL NOTE WITH NONDISCLOSURE AGREEMENTS IN
02:07PM 12 THE LAST SEVERAL YEARS THERE'S BEEN A SEA CHANGE IN HOW THOSE
02:07PM 13 ARE USED. SOMEONE SHOULD NEED TO CONTEXTUALIZE THAT.

02:08PM 14 IT'S DIFFERENT PERIODS IN THE COMPANY'S EXISTENCE, WHAT
02:08PM 15 MR. SCHENK REFERS TO AS STEALTH MODE VERSUS -- THE PUBLIC PHASE
02:08PM 16 OF THE COMPANY'S WORK.

02:08PM 17 HOW THE COMPANY GREW OVER TIME AND WHEN CERTAIN INTERNAL
02:08PM 18 RESTRICTIONS WOULD OR WOULD NOT BE APPROPRIATE. ALL OF THAT
02:08PM 19 CALLS FOR EXPERT TESTIMONY AND THERE ISN'T ANYTHING.

02:08PM 20 SO I THINK WE'RE JUST -- WE'RE SETTING OURSELVES UP FOR AN
02:08PM 21 INCREDIBLY CONFUSING NARRATIVE THAT SWEEPS IN A LARGE SWATH OF
02:08PM 22 THIS INNOCUOUS CONDUCT.

02:08PM 23 MR. SCHENK: A COUPLE OF THOUGHTS.

02:08PM 24 YOUR HONOR, THE GOVERNMENT WANTS TO OFFER THIS EVIDENCE TO
02:08PM 25 SAY THAT THESE WERE PRACTICES AT THERANOS TO PREVENT DISCOVERY

02:08PM 1 OF THE FRAUD.

02:08PM 2 THE DEFENSE IS THE ONE WHO WANTS TO SAY THERE'S AN
02:08PM 3 INNOCENT EXPLANATION FOR ALL OF THIS, JURY, IT'S TRADE SECRET
02:08PM 4 PRACTICES.

02:08PM 5 THAT THEN, IN THE GOVERNMENT'S ESTIMATION, BECOMES A
02:09PM 6 LEGITIMATE FACTUAL DISPUTE REGARDING CERTAIN PRACTICES,
02:09PM 7 THERANOS DID X, IT SILOED INFORMATION, IT DENIED KEY CARD
02:09PM 8 ACCESS TO CERTAIN EMPLOYEES FROM THIS LAB OR THAT LAB.

02:09PM 9 THE GOVERNMENT PUTS THESE FACTS BEFORE THE JURY AND FROM
02:09PM 10 THOSE FACTS ARGUES THESE STEPS WERE TAKEN BECAUSE THERANOS HAD
02:09PM 11 TO, OTHERWISE THE FRAUD WOULD HAVE BEEN DISCOVERED. THEY HAD
02:09PM 12 TO IMPOSE SILOING. THEY HAD TO RESTRICT ACCESS.

02:09PM 13 THE COURT: SO, MR. LEMENS, WHY ISN'T THIS JUST FACT
02:09PM 14 EVIDENCE, THIS IS THE WAY THE COMPANY WAS RUN, AND THE
02:09PM 15 GOVERNMENT'S POSITION IS THAT IT IS SINISTER THE WAY IT WAS RUN
02:09PM 16 AND, LADIES AND GENTLEMEN OF THE JURY, YOU SHOULD VIEW IT AS
02:09PM 17 SUCH?

02:09PM 18 AND YOU'LL STAND UP AND SAY NO. THIS IS HOW SILICON
02:09PM 19 VALLEY OPERATES. YOU PROTECT YOUR TRADE SECRETS, AND THIS IS
02:09PM 20 THE WAY IT'S DONE. THAT'S REALLY WHAT IT IS. THERE'S NOTHING
02:09PM 21 UNTOWARD ABOUT IT.

02:10PM 22 ISN'T THAT A FACTUAL ISSUE?

02:10PM 23 MR. LEMENS: I DON'T THINK SO, YOUR HONOR. CLEARLY
02:10PM 24 THERE ARE FACTS, BUT I DON'T THINK IT'S A FACTUAL DISPUTE.

02:10PM 25 I THINK FOR THE GOVERNMENT TO PRESENT THAT EVIDENCE IT HAS

02:10PM 1 TO SPECIFICALLY DO IT THROUGH 404(B) WHEN WE ARE VERY FAR AWAY
02:10PM 2 FROM THE CORE ALLEGATIONS IN THE INDICTMENT.

02:10PM 3 THE COURT: NO. RIGHT. I'M SUGGESTING IT IS NOT.
02:10PM 4 IT'S OUTSIDE OF THE 404(B) ARENA. IT'S JUST PURE FACT EVIDENCE
02:10PM 5 AND FAIR COMMENT FROM BOTH SIDES ON THE EVIDENCE.

02:10PM 6 MR. LEMENS: YEAH. I THINK IF IT'S GOING TO DO
02:10PM 7 THAT, THE ONLY ALLEGATION IS WHEN IT WAS DONE IMPROPERLY. AND
02:10PM 8 FOR IT TO BE IMPROPER, YOU HAVE TO GET BEYOND THE BOUNDS OF
02:10PM 9 WHAT ARE REASONABLE TRADE SECRETS MEASURES. I DON'T
02:10PM 10 THINK ANYONE --

02:10PM 11 THE COURT: WELL -- I'M SORRY.
02:10PM 12 ISN'T IT CIRCUMSTANTIAL EVIDENCE? CAN'T THEY ARGUE, I'M
02:10PM 13 NOT SAYING IT IS, BUT WOULDN'T THEY BE ABLE TO ARGUE
02:10PM 14 CIRCUMSTANTIALLY THE WAGON IS NARROWED WHEN THE CART STARTED
02:11PM 15 FALLING. PARDON ME, I'LL JUST PUT IT THAT WAY TO UNDERSTAND
02:11PM 16 WHAT WE'RE TALKING ABOUT.

02:11PM 17 CAN'T THEY ARGUE THAT IS CIRCUMSTANTIAL EVIDENCE, LADIES
02:11PM 18 AND GENTLEMEN, AND YOU SHOULD CONSIDER THAT THE WAGON CIRCLED
02:11PM 19 TIGHTER WHEN THIS HAPPENED, THAT THERE'S A UNIQUE TIME STAMP AS
02:11PM 20 TO THOSE TWO EVENTS?

02:11PM 21 MR. LEMENS: I DON'T -- WE'RE TALKING.

02:11PM 22 THE COURT: I'M TAKING YOU WAY OFF OF YOUR ARGUMENT
02:11PM 23 AND YOUR PRESENTATION, AND I DIDN'T MEAN TO DO THAT.

02:11PM 24 MR. LEMENS: NO. NO. LET ME JUST KIND OF BRING IT
02:11PM 25 BACK TO SAY THAT THERE IS LEGITIMATE CONDUCT THROUGHOUT THE

02:11PM 1 COMPANY'S EXISTENCE. I DON'T THINK THERE'S A DISPUTE THAT THEY
02:11PM 2 WERE DEVELOPING TECHNOLOGY, THAT THERE WAS A RESEARCH AND
02:11PM 3 DEVELOPMENT PRACTICE, THAT THERE WERE THINGS HAPPENING AT
02:11PM 4 THERANOS.

02:11PM 5 AND I DON'T KNOW HOW IT'S PERMISSIBLE TO SHIFT THAT BURDEN
02:11PM 6 TO US TO DEFEND THE LEGITIMATE CONDUCT BECAUSE I THINK THE
02:11PM 7 CONTEMPORANEOUS EVIDENCE SHOWS THAT THERE WERE TRADE SECRETS
02:11PM 8 CONCERNS, THERE WAS LITIGATION INSTITUTED BY THE COMPANY VERY
02:11PM 9 EARLY ON IN ITS EXISTENCE TO PROTECT ITS TRADE SECRETS FROM
02:12PM 10 DEPARTING EMPLOYEES.

02:12PM 11 SO WHEN THERE IS LEGITIMATE TRADE SECRET CONCERNS, AND THE
02:12PM 12 GOVERNMENT WANTS TO BLOW PAST THAT AND MAKE IT ALL SINISTER, I
02:12PM 13 THINK WE GET INTO, EVEN IF IT'S FACT EVIDENCE, EVEN IF WE'RE
02:12PM 14 OUTSIDE OF 404(B), WE HAVE GOT 403 CONCERNS THAT THE JURY IS
02:12PM 15 GOING TO SIT HERE HEARING THIS FRAMED IN A WAY BY THE
02:12PM 16 GOVERNMENT, AND WE'RE GOING TO INTRODUCE EVIDENCE OF LEGITIMATE
02:12PM 17 CONDUCT, BUT THAT SOUNDS, WHEN PRESENTED, UNFAIRLY PREJUDICIAL
02:12PM 18 AND WITH VERY LITTLE RELEVANCE TO THE REST OF THE CASE.

02:12PM 19 THE COURT: MR. SCHENK.

02:12PM 20 MR. SCHENK: THE COURT SHOULD ADMIT THIS EVIDENCE
02:12PM 21 BECAUSE IT IS INTEGRAL EVIDENCE AS TO HOW THERANOS WAS ABLE TO
02:12PM 22 COMMIT A FRAUD, HOW IT WAS ABLE TO SILO ITS EMPLOYEES, HOW IT
02:12PM 23 WAS ABLE TO DENY CERTAIN INFORMATION FROM ESCAPING THE FOUR
02:12PM 24 WALLS OF THERANOS.

02:12PM 25 SILOING, FOR INSTANCE, IS RELEVANT BECAUSE TWO PEOPLE WHO

02:13PM 1 FLEW ABOVE THE SILO WERE THE TWO CONSPIRATORS, MS. HOLMES AND
02:13PM 2 MR. BALWANI.

02:13PM 3 SO LOTS OF OTHER EMPLOYEES GOT SILOED BUT PEOPLE WHO HAD
02:13PM 4 THE OVERARCHING 36,000 FOOT VIEW WERE MS. HOLMES AND
02:13PM 5 MR. BALWANI, AND THE GOVERNMENT SHOULD BE ALLOWED TO PRESENT
02:13PM 6 THAT EVIDENCE TO THE JURY AND THEN ARGUE, AS THE COURT JUST
02:13PM 7 SAID, BEARING INFERENCES FROM THAT EVIDENCE.

02:13PM 8 AND I'M NOT FOLLOWING THE 403 ANALYSIS. IT'S PREJUDICIAL
02:13PM 9 IN THAT IT'S RELEVANT, BUT IT'S NOT UNFAIRLY PREJUDICIAL. IT'S
02:13PM 10 EVIDENCE FROM WHICH THE JURY CAN SEE HOW BUSINESS WAS CONDUCTED
02:13PM 11 AT THERANOS AND HOW IT WAS THAT THE FRAUD WAS ALLOWED TO EXIST,
02:13PM 12 HOW INFORMATION WAS KEPT WITHIN THE FOUR WALLS OF THERANOS AND
02:13PM 13 OTHERS WERE DENIED ACCESS TO THAT INFORMATION.

02:13PM 14 THE COURT: MR. LEMENS, YOU WANT TO --

02:13PM 15 MR. LEMENS: MAYBE GO BACKWARD ON THIS.

02:13PM 16 THE COURT: YOU DO, YOU DO. IT'S YOUR MOTION.

02:13PM 17 MR. LEMENS: RIGHT. AND I THINK MAYBE JUST, YOU
02:13PM 18 KNOW, WE'VE HEARD SOME NEW THEORIES TODAY, AND I WOULD REMIND
02:14PM 19 THE COURT WE HAVE BRIEFED THIS, THE GOVERNMENT HAS TAKEN ITS
02:14PM 20 POSITION, AND I THINK THE COURT SHOULD HOLD IT TO ITS PRIOR
02:14PM 21 REPRESENTATIONS.

02:14PM 22 I THINK THE ISSUES AND ESPECIALLY THE LEGITIMATE PRACTICES
02:14PM 23 ARE PROBLEMATIC WHEN INTRODUCED IN THE WAY THAT THE GOVERNMENT
02:14PM 24 IS SUGGESTING.

02:14PM 25 AND I DON'T SEE HOW A WITNESS CAN COME ON TO THE STAND AND

02:14PM 1 SAY I THOUGHT THE COMPANY WAS VERY SECRETIVE AND NOT TO BE
02:14PM 2 RELEVANT WITHOUT -- AND NOT TO BE INCREDIBLY PREJUDICIAL TO THE
02:14PM 3 DEFENSE WHEN WE THEN TAKE ON -- HAVE TO TAKE ON THE BURDEN OF
02:14PM 4 JUSTIFYING ALL OF THE PRACTICES. I THINK IT'S FOR THE
02:14PM 5 GOVERNMENT TO SORT OUT WHICH PIECE OF THAT IS THE VERY PART.

02:14PM 6 THE COURT: IF THE WITNESS SAYS I'VE WORKED IN
02:14PM 7 VARIOUS STARTUPS IN SILICON VALLEY AND I'VE NEVER, EVER
02:14PM 8 EXPERIENCED THE SHELTERING IN PLACE, THE SECRECY THAT I
02:14PM 9 EXPERIENCED DURING MY TENURE AT THIS COMPANY, IS THAT RELEVANT?

02:14PM 10 MR. LEMENS: I THINK IF THE GOVERNMENT WOULD WANT TO
02:15PM 11 PROFFER THAT PERSON AS AN EXPERT, WE COULD GO THROUGH THE
02:15PM 12 PROCESS OF TESTING THEIR OPINIONS.

02:15PM 13 I THINK WHERE I WAS GOING TO GO, AND MAYBE WE'RE ON THE
02:15PM 14 SAME PAGE HERE, IS IF THIS EVIDENCE WAS GOING TO COME IN
02:15PM 15 THROUGH A PARTICULAR WITNESS, MAYBE WE DO NEED TO DO THIS ON A
02:15PM 16 CASE-BY-CASE BASIS BEFORE THAT WITNESS TESTIFIES, UNDERSTANDING
02:15PM 17 WHAT THE GOVERNMENT IS PROFFERING ABOUT WHAT THEY'RE GOING TO
02:15PM 18 SAY ON THIS MATTER AND WHAT THE BURDEN LOOKS LIKE, WHAT THE
02:15PM 19 PREJUDICE LOOKS LIKE, WHETHER WE'RE GOING TO CROSS INTO
02:15PM 20 EXPERTISE ABOUT TRADE SECRET PRACTICES.

02:15PM 21 SO IF YOUR HONOR IS NOT INCLINED TO RULE CERTAINLY FOR US,
02:15PM 22 BUT THERE'S A NUMBER OF ISSUES HERE THAT PERHAPS WE SHOULD DEAL
02:15PM 23 WITH THIS AT TRIAL.

02:15PM 24 THE COURT: OKAY. THANK YOU.

02:15PM 25 THERE'S ANOTHER PORTION OF THIS MOTION, I THINK, THAT

02:15PM 1 RELATES TO SPECIFIC CONDUCT AND INVOLVING SOME INDIVIDUALS,
02:15PM 2 SHULTZ AND CHEUNG?

02:15PM 3 MR. LEMENS: YES, AND ON THAT I THINK THOSE ARE
02:15PM 4 ARGUMENTS THAT THE GOVERNMENT HAS PRESENTED. IT'S NOT OUT OF
02:15PM 5 THE ORDINARY FOR EMPLOYEE DEPARTURES TO BE LITIGIOUS OR
02:16PM 6 CONFRONTATIONAL. THE GOVERNMENT PROSECUTES INDIVIDUALS WHEN
02:16PM 7 THEY LEAVE COMPANIES FOR THEFT OF TRADE SECRETS. THIS CAN BE A
02:16PM 8 SERIOUS INCIDENT.

02:16PM 9 WE ARE STILL WITHOUT WHO IS GOING TO EXPLAIN WHEN THOSE
02:16PM 10 PRACTICES BECOME IMPERMISSIBLE. THERE'S STILL NO EXPERT.

02:16PM 11 I DON'T THINK MR. SHULTZ OR MS. CHEUNG ARE QUALIFIED TO
02:16PM 12 OFFER THAT TESTIMONY WHEN THIS WAS THEIR FIRST JOB OUT OF
02:16PM 13 COLLEGE. I DON'T KNOW WHAT EXPERTISE DR. ROSENDORFF WOULD HAVE
02:16PM 14 TO OFFER THAT TESTIMONY.

02:16PM 15 SO THERE'S STILL THE ISSUES ABOUT THE OTHERWISE INNOCUOUS
02:16PM 16 CONDUCT THAT WE'VE BEEN DISCUSSING.

02:16PM 17 I THINK THESE TWO -- WELL, ONE MORE. WHAT IS THE
02:16PM 18 CONNECTION TO MS. HOLMES IS STILL A LIVE ISSUE. THE GOVERNMENT
02:16PM 19 HAS MADE SOME ASSERTIONS. I THINK MS. SAHARIA IS GOING TO
02:16PM 20 ADDRESS AGENCY ISSUES IN A SUBSEQUENT MOTION AND THAT PERHAPS
02:16PM 21 THESE TWO ARE WORTH DEFERRING ON UNTIL WE GET A BETTER SENSE OF
02:16PM 22 EXACTLY WHAT THE PROFFER IS FOR FOUNDATION TO ADMIT THIS IN
02:17PM 23 THIS TRIAL.

02:17PM 24 THE COURT: MR. SCHENK.

02:17PM 25 MR. SCHENK: YOUR HONOR, I'M HAPPY TO ADDRESS THE

02:17PM 1 RELEVANCE OF THOSE TWO STORIES.

02:17PM 2 AGAIN, IT'S RELEVANT BECAUSE THE JURY SHOULD GET TO HEAR
02:17PM 3 WHAT THERANOS DID WHEN WHISTLE BLOWERS TRIED TO COME FORWARD,
02:17PM 4 WHEN INDIVIDUALS TRIED SAY, WHEN EMPLOYEES TRIED TO SAY WE'RE
02:17PM 5 DOING SOMETHING WRONG AND IT BOTHERS US. AND THE GOVERNMENT
02:17PM 6 PUTS THEIR STORIES BEFORE THE JURY.

02:17PM 7 IF THE DEFENSE WANTS TO RESPOND SOMETIMES EMPLOYEE
02:17PM 8 DEPARTURES GET HOSTILE, THEY CAN MAKE THAT ARGUMENT AND THE
02:17PM 9 JURY CAN DECIDE WHICH VERSION OF THE EVENTS DID I BELIEVE? DID
02:17PM 10 THERANOS REALLY HAVE A REASON TO GET WORRIED OR TO GET SCARED
02:17PM 11 WHEN EMPLOYEES STARTED CONTACTING REGULATORS, WHEN EMPLOYEES
02:17PM 12 STARTED TO WORRY ABOUT THE ACCURACY OF TESTS, WHEN EMPLOYEES
02:17PM 13 STARTED TO RAISE RED FLAGS?

02:17PM 14 THE JURY GETS TO DECIDE WAS THERANOS'S RESPONSE NORMAL FOR
02:18PM 15 PEOPLE THAT LIVE IN THE WORLD, NORMAL EMPLOYMENT ACTIONS AFTER
02:18PM 16 AN EMPLOYEE LEAVES AND THE RELATIONSHIP IS HOSTILE OR WAS
02:18PM 17 THERANOS TREATING THIS EMPLOYEE THAT WAY BECAUSE OF THE THREAT
02:18PM 18 THAT EMPLOYEE POSED?

02:18PM 19 AND THOSE ARE RELEVANT PIECES OF EVIDENCE FOR THE JURY TO
02:18PM 20 GET TO DECIDE WHICH VERSION OF EVENTS THEY CHOOSE TO BELIEVE.

02:18PM 21 THE COURT: IS THAT 404(B), MR. SCHENK?

02:18PM 22 MR. SCHENK: I THINK IT IS, BUT I THINK THE CASE LAW
02:18PM 23 SUGGESTS THAT THREATS OR INTIMIDATION IS A PROPER BASIS TO
02:18PM 24 ADMIT IT. LET ME BE MORE CLEAR. I THINK THERE'S A 404(B)
02:18PM 25 BASIS TO ADMIT IT.

02:18PM 1 NOW, THIS CONDUCT OCCURRED AT THE TIME OF THE FRAUD. IN
02:18PM 2 OTHER WORDS, CONSISTENT WITH OR OVERLAPPING WITH THE TIME WHEN
02:18PM 3 THERANOS WAS SAYING ONE THING TO INVESTORS ABOUT THE ABILITY OF
02:19PM 4 ITS TECHNOLOGY, BUT KNOWING SOMETHING DIFFERENT WITHIN THE FOUR
02:19PM 5 WALLS OF THERANOS.

02:19PM 6 SO TO THAT EXTENT, NO, THERE IS CERTAINLY RELEVANT
02:19PM 7 EVIDENCE THAT THESE WITNESSES HAVE TO PROVIDE TO THE COURT THAT
02:19PM 8 IS SIMPLY JUST FACT EVIDENCE. I WAS WORRIED ABOUT THIS TEST.
02:19PM 9 I WAS WORRIED ABOUT OUR QC. I WAS WORRIED ABOUT X. AND WHEN
02:19PM 10 THERANOS DIDN'T DO ANYTHING ABOUT IT, I LEFT. SO THERE ARE
02:19PM 11 CERTAINLY ELEMENTS TO IT THAT ARE --

02:19PM 12 THE COURT: AND THE EVIDENCE IS, I THINK IT'S IN THE
02:19PM 13 RECORD HERE AND PLEASE STOP ME IF IT IS NOT, BUT I THINK WHAT I
02:19PM 14 READ WAS AS TO THESE TWO INDIVIDUALS THAT WE'VE TALKED ABOUT,
02:19PM 15 THE GOVERNMENT WISHES TO PRESENT TO THE JURY THEIR EXPERIENCES
02:19PM 16 POST LEAVING, POST REPORTING OR AT LEAST EXPRESSING CONCERNS
02:19PM 17 ABOUT THE COMPANY AND THE EXPERIENCES THAT THEY RECEIVED
02:19PM 18 SUBSEQUENT TO THAT INVOLVE, I'LL JUST PUT IT BLACK SUV'S, BLUE
02:19PM 19 SUITS, AND NDA'S, AT HOURS OF THE DAY THAT WERE AT LEAST
02:20PM 20 OTHERWISE UNUSUAL FOR THAT TYPE OF CONDUCT.

02:20PM 21 IS THAT --

02:20PM 22 MR. SCHENK: YES, YOUR HONOR. AND WHAT I WAS
02:20PM 23 ATTEMPTING TO DO WAS MAYBE DRAW A DISTINCTION BETWEEN THE TYPES
02:20PM 24 OF EVIDENCE THAT EACH WITNESS WOULD PROVIDE, SOME OF IT BEING
02:20PM 25 PURE FACT, AND THEN AS THE COURT JUST SUMMARIZED, I THINK THAT

02:20PM 1 PROBABLY DOES MORE PROPERLY FALL UNDER 404(B) .

02:20PM 2 THE COURT: AND I LOOKED AT THAT AND I THOUGHT IS
02:20PM 3 THAT, AND I'M LOOKING AT MR. LEMENS NOW, IS THAT CONDUCT,
02:20PM 4 ASSUMING IT COMES IN, DOES IT COME IN BECAUSE IT'S INEXTRICABLY
02:20PM 5 INTERTWINED WITH THE CONSPIRACY AND THE CONDUCT THAT IS ALLEGED
02:20PM 6 IN THE INDICTMENT, THAT IS, THAT IN ORDER TO -- THERE WAS A
02:20PM 7 FRAUD THAT WAS ENGAGED AND IN ORDER TO CONTINUE WITH THE FRAUD
02:20PM 8 THE DEFENDANT SOUGHT OUT -- AND HERE'S A BIG LINK THAT
02:20PM 9 MR. SCHENK IS GOING TO HAVE TO OVERCOME -- HOW DOES IT TRACE
02:21PM 10 BACK TO MS. HOLMES? PARDON ME, I DON'T MEAN TO POINT. BUT HOW
02:21PM 11 DOES IT TRACE BACK TO HER?

02:21PM 12 BUT ENGAGING THE FRAUD, PART OF THE CONCERN WAS TO KEEP IT
02:21PM 13 SECRET, TO KEEP PEOPLE FROM SPILLING THE BEANS, IF YOU WILL,
02:21PM 14 TALKING ABOUT WHAT IS REALLY HAPPENING AND TO DO THAT THIS
02:21PM 15 BEHAVIOR WITH SUV'S, NDA'S, AFTER HOURS, WE HEARD MS. CHEUNG
02:21PM 16 TALK ABOUT HOW DID THEY EVEN FIND ME? NO ONE KNEW MY ADDRESS.
02:21PM 17 AND IT COULD BE PERCEIVED AS A THREAT, INTIMIDATION. ISN'T
02:21PM 18 THAT INEXTRICABLY INTERTWINED WITH A SCHEME TO DEFRAUD AND TO
02:21PM 19 KEEP IT FROM BEING DISCOVERED?

02:21PM 20 THAT'S A LOT TO TALK ABOUT.

02:21PM 21 MR. LEMENS: I'LL TRY TO TAKE IT IN A FEW PIECES.

02:21PM 22 I DON'T THINK ANYONE WOULD DISPUTE THAT THIS IS AN
02:21PM 23 INCREDIBLY INFLAMMATORY NARRATIVE AS THE GOVERNMENT DESCRIBED
02:21PM 24 IT, SO THERE'S A HIGH RISK OF PREJUDICE.

02:21PM 25 THE COURT: AND WE'LL TALKING ABOUT THE 403 PART,

02:21PM 1 SURE.

02:21PM 2 MR. LEMENS: THERE'S THE LINK WHICH YOUR HONOR
02:22PM 3 MENTIONED, THERE'S THE PRESENCE OF ATTORNEYS AND PRIVILEGED
02:22PM 4 RELATIONSHIPS WHICH MS. HOLMES HOLDS, AND, OF COURSE, IS NOT
02:22PM 5 REQUIRED TO DROP. YOU'VE GOT ATTORNEYS HERE SO WE HAVE SOME
02:22PM 6 PRIVILEGE ISSUES THAT --

02:22PM 7 THE COURT: WELL, I DON'T THINK THERE'S ANY
02:22PM 8 CONVERSATIONS. THERE IS CERTAINLY NO ATTORNEY-CLIENT PRIVILEGE
02:22PM 9 WITH THE CONTACTEES.

02:22PM 10 MR. LEMENS: BUT THERE'S AN ASSERTION FROM THE
02:22PM 11 GOVERNMENT THAT MS. HOLMES DIRECTED ATTORNEYS TO DO THAT. SO
02:22PM 12 YOU'VE GOT LAWYERS. I JUST WANT TO GET THE ISSUES OUT ON THE
02:22PM 13 TABLE.

02:22PM 14 THE COURT: RIGHT.

02:22PM 15 MR. LEMENS: YOU HAVE DEPARTING EMPLOYEES WHO I
02:22PM 16 DON'T THINK THERE'S A DISPUTE ARE VIOLATING THEIR
02:22PM 17 CONFIDENTIALITY OBLIGATIONS TO THE COMPANY.

02:22PM 18 SO YOU HAVE, I THINK, WHAT IS -- I DON'T THINK IT'S A
02:22PM 19 CONTESTED OBLIGATION.

02:22PM 20 SO AGAIN WE'RE BACK AND THE SAME QUESTION IS WAS -- DID
02:22PM 21 THE COMPANY HAVE A BASIS TO LITIGATE, RIGHT? DID THE COMPANY
02:22PM 22 HAVE -- WAS THAT A REASONABLE MEASURE?

02:22PM 23 YOU WOULD EXPECT TO SEE AN EXPERT TO COME IN AND SAY, YOU
02:22PM 24 KNOW, HERE'S THIS PORTION OF IT, YES, WE WOULD AGREE WITH AND
02:23PM 25 THIS PORTION PERHAPS WE THINK IS IMPROPER AND WE COULD JOIN THE

02:23PM 1 ARGUMENT THERE AND HAVE THAT DEBATE.

02:23PM 2 BUT FOR THE GOVERNMENT TO SEEK TO BRING IN AT LEAST SOME
02:23PM 3 OF WHICH MUST BE LEGITIMATE CONDUCT TO PROTECT ITS TRADE
02:23PM 4 SECRETS, I THINK WE GET INTO THE SAME ISSUES WE HAVE BEEN
02:23PM 5 DISCUSSING.

02:23PM 6 THE COURT: IS THAT FOR THE JURY -- IS THAT A FACT
02:23PM 7 QUESTION FOR THE JURY TO DECIDE THAT BLACK SUV'S AFTER HOURS,
02:23PM 8 BLUE SUITS COMING OUT WITH NDA'S DEMANDING TO SIGN IT, IS THAT
02:23PM 9 FOR THE JURY TO DECIDE?

02:23PM 10 MR. LEMENS: IF IT IS A REASONABLE MEASURE THAT A
02:23PM 11 COMPANY WOULD TAKE, I THINK IT'S FOR AN EXPERT TO OPINE. I
02:23PM 12 THINK IT'S BEYOND WHAT YOU COULD CONSIDER LAY TESTIMONY.

02:23PM 13 YOUR HONOR HAS NOW MENTIONED BLACK SUV'S SEVERAL TIMES.
02:23PM 14 I HAVE SEARCHED THE GOVERNMENT'S PRODUCTION TO FIND REFERENCE
02:23PM 15 TO IT. I DON'T SEE IT. I KNOW IT'S IN THEIR BELIEF.

02:23PM 16 THE COURT: I THOUGHT I SAW IT.

02:23PM 17 MR. LEMENS: WELL, IT'S IN THEIR BRIEF BUT THE BRIEF
02:23PM 18 ALSO DOESN'T CITE TO EVIDENCE.

02:23PM 19 THE COURT: THAT'S WHY I'M SAYING IT.

02:23PM 20 MR. LEMENS: RIGHT. WELL, I WANT TO BE VERY CAREFUL
02:24PM 21 ABOUT WHAT HAS BEEN SAID HERE. WE'LL NEED TO MAKE SURE THAT
02:24PM 22 THERE'S A BASIS FOR THAT.

02:24PM 23 BUT I DON'T THINK THAT -- IT'S CERTAINLY NOT FOR ME TO
02:24PM 24 MAKE THE ASSESSMENT OF WHAT WAS A REASONABLE MEASURE. I THINK
02:24PM 25 IT'S FOR SOMEONE WITH EXPERTISE IN THE FIELD. THE GOVERNMENT

02:24PM 1 HAS NOT PROVIDED THAT PERSON.

02:24PM 2 THE COURT: FAIR ENOUGH. AND THIS IS WOULD BE, AS
02:24PM 3 WE HAVE TALKED ABOUT BEFORE, IF SOMEONE -- A WITNESS SAID I'VE
02:24PM 4 BEEN PRACTICING, I HAVE BEEN EMPLOYED, AND I KNOW ABOUT NDA'S,
02:24PM 5 I'VE SIGNED HUNDREDS OF THEM, I NEVER HAD AN EXPERIENCE LIKE
02:24PM 6 THIS BEFORE, THAT MIGHT BE A DIFFERENT THING?

02:24PM 7 MR. LEMENS: RIGHT. WE COULD THEN LITIGATE THE
02:24PM 8 BASIS AND THE METHOD AND THE RELIABILITY OF THAT OPINION.

02:24PM 9 THE COURT: RIGHT. OKAY. I JUST WANT TO TURN TO
02:24PM 10 BOTH TEAMS HERE.

02:24PM 11 DOES ANYBODY NEED A BREAK? ARE WE OKAY?

02:24PM 12 MS. SAHARIA: WE'RE OKAY.

02:24PM 13 THE COURT: YOUR TEAM IS OKAY?

02:24PM 14 MR. SCHENK: YES, YOUR HONOR. THANK YOU.

02:24PM 15 THE COURT: ALL RIGHT. GREAT. THANK YOU.

02:24PM 16 MR. LEMENS: I WOULD MOVE TO 576 IF THAT WORKS,
02:24PM 17 YOUR HONOR.

02:24PM 18 THE COURT: ANYTHING FURTHER ON THIS?

02:24PM 19 MR. SCHENK: NO, YOUR HONOR.

02:25PM 20 THE COURT: OKAY. THANK YOU.

02:25PM 21 MR. LEMENS: SO HERE WE'RE TALKING ABOUT THE
02:25PM 22 COMPANY'S USE OF MODIFIED COMMERCIAL TESTING PLATFORMS AND I
02:25PM 23 WILL JUST QUICKLY TO REFRESH WHERE WE ARE.

02:25PM 24 MS. SAHARIA MENTIONED ON THE FIRST DAY THE COMPANY HAD
02:25PM 25 USED THREE DIFFERENT TYPES OF TECHNICAL HARDWARE IN ITS

02:25PM 1 CLINICAL LAB. ONE WAS COMMERCIAL DEVICES WITHOUT ANY
02:25PM 2 MODIFICATION; THE SECOND WAS THE THERANOS DEVICE, THE TSPU;
02:25PM 3 AND, THE THIRD WERE COMMERCIAL DEVICES THAT THE COMPANY HAD
02:25PM 4 MODIFIED IN ORDER TO RUN A SMALL SAMPLE TEST. AND SO THAT'S
02:25PM 5 WHAT WE'RE FOCUSSED ON HERE.

02:25PM 6 THAT -- IT'S HELPFUL TO KEEP IN MIND THAT THE COMPANY
02:25PM 7 SPENT YEARS DEVELOPING SMALL -- THE ABILITY TO RUN BLOOD TESTS
02:25PM 8 ON SMALL SAMPLES. THAT SEPARATE AND APART FROM THE DEVICE WAS
02:25PM 9 THE FOCUS OF THEIR RESEARCH AND DEVELOPMENT EFFORTS.

02:25PM 10 AND THE CHEMISTRY IS I THINK THE TECHNICAL TERM, OR THE
02:26PM 11 RECIPE, FOR HOW YOU DO THIS IS NOT NECESSARILY UNIQUE TO THE
02:26PM 12 TSPU OR THE PROPRIETARY DEVICE. IT COULD HAVE APPLICATION TO
02:26PM 13 OTHER PLATFORMS.

02:26PM 14 SO AT THIS POINT THE COMPANY GOES AND SAYS, WELL, CAN WE
02:26PM 15 DO THIS ON A DIFFERENT DEVICE? COULD WE DO THIS AT A HIGHER
02:26PM 16 THROUGHPUT? COULD WE DO THIS IN A MORE EFFICIENT WAY?

02:26PM 17 THEY ENGAGED A CROSS OR A DIVERSE TEAM OF HIGHLY QUALIFIED
02:26PM 18 SCIENTISTS. YOU HAVE DR. YOUNG WHO IS A SENIOR LEADER AT THE
02:26PM 19 COMPANY, A PH.D. FROM M.I.T., PH.D. IN PHYSICS, PEOPLE WITH
02:26PM 20 EXPERIENCE IN THE LABORATORY WHO LOOK AT THESE DEVICES AND SAY
02:26PM 21 IS THERE SOMETHING THAT WE CAN DO WITH IT?

02:26PM 22 THEY LAND ON THE ADVIA, A-D-V-I-A, DEVICE, WHICH IS
02:26PM 23 MANUFACTURED BY SIEMENS. IT HAS THE CAPACITY TO RUN UP TO 1800
02:26PM 24 TESTS PER HOUR.

02:26PM 25 THE COURT: IS THIS THE MACHINE THAT IS

02:26PM 1 PROGRAMMABLE?

02:27PM 2 MR. LEMENS: YES. YES, YOUR HONOR.

02:27PM 3 THE COURT: AND IT'S OPEN SOURCE TO A CERTAIN DEGREE
02:27PM 4 I BELIEVE.

02:27PM 5 MR. LEMENS: YES, YOUR HONOR. THERE'S AN ABILITY
02:27PM 6 FOR THE -- FOR I DON'T WANT TO CALL THEM CLIENTS BUT PEOPLE WHO
02:27PM 7 PURCHASE THAT DEVICE TO THEN ADD THEIR OWN ASSAYS, RIGHT, THEIR
02:27PM 8 LABORATORY DEVELOPED TESTS. AND THAT'S WHAT THE COMPANY DID
02:27PM 9 HERE.

02:27PM 10 I THINK THERE'S SOME DISPUTE, BUT THE GOVERNMENT CERTAINLY
02:27PM 11 WANTS TO CHALLENGE THE NATURE OF THOSE MODIFICATIONS AND THE
02:27PM 12 SPECIFIC MODIFICATIONS, AND THEY WANT TO ALLEGE THAT THOSE
02:27PM 13 MODIFICATIONS WERE CONCEALED.

02:27PM 14 THE COURT: WELL, THEY USE THE WORD "TAMPER" I
02:27PM 15 THINK.

02:27PM 16 MR. LEMENS: THEY STARTED WITH TAMPER. I THINK
02:27PM 17 THEY'VE BACKED OFF OF THAT. THEN THEY WENT TO INDUSTRY --
02:27PM 18 INCONSISTENT WITH INDUSTRY STANDARDS OR MANUFACTURER
02:27PM 19 EXPECTATIONS, AND THEY'VE BACKED OFF FROM THAT AND THEY MADE
02:27PM 20 THE CONCESSION THAT THEY DON'T INTEND TO PRESENT EVIDENCE THAT
02:27PM 21 THESE MODIFICATIONS ARE INCONSISTENT WITH INDUSTRY STANDARDS OR
02:27PM 22 MANUFACTURER USE AGREEMENTS OR OTHERWISE IMPROPER. I THINK
02:28PM 23 THAT'S -- HE'LL TELL ME IF I'VE GOT THE LANGUAGE WRONG.

02:28PM 24 BUT YOU SHOULD HOLD THEM TO THAT CONCESSION.

02:28PM 25 BUT THE BRIEF -- THEIR OPPOSITION, HOWEVER, AND THIS IS AT

02:28PM 1 DOCKET 666, THEN GOES ON TO SAY, WELL, THESE WERE NOT COMMON,
02:28PM 2 THESE WERE NONSTANDARD, UNUSUAL, UNKNOWN. AND I THINK THE
02:28PM 3 IMPLICATION IS CLEAR THAT THEY WANT TO CONTINUE TO CAST DOUBT
02:28PM 4 ON THE MODIFICATIONS.

02:28PM 5 THE PROBLEM FROM OUR PERSPECTIVE IS THAT IS SCIENTIFIC AND
02:28PM 6 TECHNICAL KNOWLEDGE, AND THEY DON'T HAVE AN EXPERT WHO WILL DO
02:28PM 7 THAT. DR. ROSENDORFF TALKS ABOUT THE RESULT THAT CAME OUT OF
02:28PM 8 THIS DEVICE, BUT HE NEVER ADDRESSES THE HARDWARE INSERT THAT
02:28PM 9 WAS DESIGNED AND SAYS THAT WAS IMPROPER OR THIS WAS
02:28PM 10 INCONSISTENT. HE NEVER ADDRESSES THE SOFTWARE PROGRAMMING TO
02:29PM 11 SAY THE SAME.

02:29PM 12 SO I THINK WE'RE LOOKING FOR YOUR HONOR TO NOT ELIMINATE
02:29PM 13 BUT TO CONSTRAIN THE GOVERNMENT'S USE TO THE TESTIMONY IT HAS
02:29PM 14 DISCLOSED, AND CERTAINLY THERE'S NOTHING TO SUGGEST THAT THEY
02:29PM 15 CAN REFER TO THIS AS NONSTANDARD OR WE MAY SEE THEM ARGUE THE
02:29PM 16 IMPLICATION THAT THEY'RE SOMEHOW IMPROPER.

02:29PM 17 THE COURT: OKAY. SO, MR. SCHENK, AS I UNDERSTAND
02:29PM 18 IT, THE SIEMENS MACHINE WAS PURCHASED, IT WAS USED, IT HAS OPEN
02:29PM 19 SOURCE TO A CERTAIN POINT, DESIGNED TO ALLOW PURCHASERS,
02:29PM 20 CONSUMERS, CUSTOMERS TO BUY OR MODIFY THE MACHINE AS THEY
02:29PM 21 WANTED TO. THAT WAS THE SALIENT FEATURES OF THE MACHINE, IT
02:29PM 22 WAS ATTRACTIVE TO VARIOUS LABORATORIES, CLIENTS.

02:29PM 23 AND HERE I THINK IT SOUNDS LIKE THE ARGUMENT IS AT SOME
02:29PM 24 POINT THE J CUP WAS USED OR INSTEAD OF THE T CUP, AND SOFTWARE
02:29PM 25 MODIFICATIONS WERE DONE, AND IT SOUNDS LIKE THE MACHINE WAS

02:30PM 1 DESIGNED TO ALLOW THOSE MODIFICATIONS SUCH THAT THE CONSUMER,
02:30PM 2 WHOEVER PURCHASED IT COULD CREATE THIS FOLK MACHINE FOR THEIR
02:30PM 3 NEEDS.

02:30PM 4 IS THERE SOMETHING UNTOWARD ABOUT THAT THAT YOU WANTED TO
02:30PM 5 RAISE?

02:30PM 6 MR. SCHENK: YES. A COUPLE OF THINGS.

02:30PM 7 THE COURT: OKAY.

02:30PM 8 MR. SCHENK: FIRST, THE FACT THAT THERANOS USED
02:30PM 9 MODIFIED SIEMENS MACHINES, I DON'T THINK EITHER SIDE IS
02:30PM 10 DISPUTING WILL COME, THAT FACT IS RELEVANT BECAUSE IF THE TSP
02:30PM 11 WORKED AS ADVERTISED, WHY THE NEED TO USE OR TO MODIFY? THAT'S
02:30PM 12 A QUESTION THAT THE GOVERNMENT IS BARELY ALLOWED TO PRESENT AND
02:30PM 13 ARGUE FROM IN FRONT OF THE JURY.

02:30PM 14 THE QUESTION NOW -- LET ME TURN TO MODIFICATIONS OF THE
02:30PM 15 SIEMENS MACHINES. AN EMPLOYEE, FORMER EMPLOYEE TOLD THE
02:30PM 16 GOVERNMENT THAT THE ONLY REASON THAT THERANOS WAS ALLOWED TO
02:30PM 17 MAKE THE MODIFICATIONS TO THE SIEMENS MACHINE THAT IT MENTIONED
02:30PM 18 WAS BECAUSE A SIEMENS TECH ACCIDENTALLY LEFT OPEN SOME OF THE
02:31PM 19 SOFTWARE.

02:31PM 20 THE COURT: WELL, I SAW THAT IN SOME OF YOUR
02:31PM 21 PLEADINGS AND I WONDERED THAT'S WHAT YOU WANT TO GET IN AS FACT
02:31PM 22 EVIDENCE?

02:31PM 23 MR. SCHENK: YES.

02:31PM 24 THE COURT: CONTINUE. I'M SORRY.

02:31PM 25 MR. SCHENK: OKAY. IT IS REASONABLE TO ARGUE, AND

02:31PM 1 WE NOTICED DR. ROSENDORFF AS AN EXPERT ON SOME OF THE
02:31PM 2 DISADVANTAGES TO THE SPECIFIC MODIFICATIONS THAT THERANOS MADE
02:31PM 3 AND COMBINED THOSE TWO FACTS.

02:31PM 4 DR. ROSENDORFF, WHO WORKED AT THERANOS AND WAS A LAB
02:31PM 5 DIRECTOR SAYING WHEN YOU MAKE THESE KIND OF MODIFICATIONS, YOU
02:31PM 6 RUN INTO PROBLEMS CAUSED BY DILUTION. IS THE MACHINE GOING TO
02:31PM 7 PICK UP THE CONCENTRATION IN THE SAMPLE IF IT IS DILUTED AS
02:31PM 8 MUCH AS IT IS, IS THE SAMPLE VALUE IS AS SMALL AS IT IS,
02:31PM 9 COMBINE THAT FACT WITH THE FACT THAT THIS MODIFICATION, OR
02:31PM 10 MODIFICATIONS TO THE SIEMENS MACHINE OCCURRED AFTER A BACK DOOR
02:31PM 11 IS LEFT OPEN, IT'S, OF COURSE, REASONABLE FOR THE JURY TO INFER
02:32PM 12 FROM THOSE FACTS THAT THE RISK OF CREATING ACCURATE AND
02:32PM 13 RELIABLE TEST RESULTS INCREASED, THAT THOSE TWO FACTS ARE FACTS
02:32PM 14 TO PUT IN FRONT OF THE JURY AND TO DRAW THOSE INFERENCES FROM.

02:32PM 15 MR. LEMENS: SURE. SO I THINK THE INDIVIDUAL THAT
02:32PM 16 THEY'RE REFERENCING ABOUT THE BACK DOOR, THIS BEING SOMEWHAT,
02:32PM 17 AGAIN, AN INFLAMMATORY ACCUSATION HAD NO ROLE WITHIN THE DESIGN
02:32PM 18 OR PROJECT RELATED TO THESE DEVICES. PERHAPS WE NEED TO DO
02:32PM 19 THAT AT TRIAL.

02:32PM 20 BUT WITH DR. ROSENDORFF THE ISSUE IS HE DOESN'T CONNECT
02:32PM 21 THE SPECIFIC MODIFICATIONS TO THE RESULT THAT HE'S CONCERNED
02:32PM 22 ABOUT, WHICH IS EXCESS DILUTION, RIGHT? HE TALKS ABOUT EXCESS
02:32PM 23 DILUTION, AND I THINK HIS DISCLOSURE FAIRLY READ SAYS DILUTION
02:33PM 24 ISSUES CAN EXACERBATE THE EFFECT OF DEVICE BIAS.

02:33PM 25 HE DOESN'T SAY THAT THEY DO. HE DOESN'T SAY THAT THERE'S

02:33PM 1 ANY EVIDENCE THAT THERE WAS AN ACCURACY AND RELIABILITY ISSUE
02:33PM 2 WITH RESPECT TO THESE MODIFICATIONS.

02:33PM 3 IT'S UNCLEAR -- I KNOW HE EXPLAINS THE ISSUE BUT WHAT DATA
02:33PM 4 OR METHODOLOGY HE WAS RELYING ON HERE WHEN HE REACHED THIS
02:33PM 5 CONCLUSION. I DON'T BELIEVE HE LOOKED AT THE TESTING DATA TO
02:33PM 6 SAY THAT I'VE LOOKED AT THE RESULTS OF THESE TESTS, AND I CAN
02:33PM 7 CONCLUDE BASED ON THAT REVIEW THAT THERE WAS AN ACCURACY AND
02:33PM 8 RELIABILITY ISSUE.

02:33PM 9 SO I THINK OUR CONCERN IS THAT YOU'VE GOT A SOMEWHAT
02:33PM 10 ISOLATED OPINION THAT IS NOT ON THE FRONT END CONNECTED TO THE
02:33PM 11 MODIFICATIONS AND IS NOT ON THE BACK END CONNECTED, THERE'S NOT
02:34PM 12 A LINK TO ACCURACY AND RELIABILITY. IT'S KIND OF A
02:34PM 13 HYPOTHETICAL MAYBE.

02:34PM 14 SO THERE'S A CONCERN THERE THAT THEY'RE DRAWING A PRETTY
02:34PM 15 BIG INFERENCE FROM THOSE TWO PIECES OF EVIDENCE AND WHETHER
02:34PM 16 THEY SHOULD BE ALLOWED TO DO.

02:34PM 17 THE COURT: OKAY.

02:34PM 18 MR. SCHENK: YOUR HONOR, THAT LARGELY FEELS LIKE
02:34PM 19 WEIGHT ARGUMENTS TO ME. THEY OBVIOUSLY ARE GOING TO
02:34PM 20 CROSS-EXAMINE DR. ROSENDORFF ON THOSE TOPICS.

02:34PM 21 THE MOTION SOUGHT, AS I STOOD AND READ IT, WAS TO EXCLUDE
02:34PM 22 THE PHRASE "TAMPER WITH" OR "CONCEAL." AND I ONLY ENDEAVOR TO
02:34PM 23 PROVIDE THE COURT WITH A BASIS FOR THE GOVERNMENT'S EVIDENCE ON
02:34PM 24 THOSE TWO PHRASES.

02:34PM 25 THE COURT: OKAY. ANYTHING FURTHER, MR. LEMENS?

02:34PM 1 MR. LEMENS: I WANT TO CLARIFY.

02:34PM 2 IF THE CONCESSION IS WE'RE NOT GOING TO COMPARE THIS TO
02:34PM 3 THE INDUSTRY, WE'RE NOT GOING TO SAY IT WAS UNCOMMON OR UNUSUAL
02:34PM 4 THAT THEY WERE TAMPERED WITH, THAT THEY WERE CONCEALED OR
02:34PM 5 ALTERED, I DON'T KNOW IF THAT'S WHAT I'M HEARING BUT I THINK
02:34PM 6 THAT WAS THE REASON FOR THE MOTION.

02:34PM 7 THE COURT: I HEARD HIM SAY "TAMPER." I DIDN'T HEAR
02:35PM 8 HIM SAY THE OTHER THINGS.

02:35PM 9 MR. SCHENK: YES, WE DO WANT TO ARGUE TAMPER BUT FOR
02:35PM 10 CLARIFICATION PURPOSES, WE DO NOT PLAN TO ARGUE THAT THE
02:35PM 11 MODIFICATIONS WERE UNETHICAL OR VIOLATED SOME INDUSTRY
02:35PM 12 STANDARD.

02:35PM 13 THE COURT: IS THAT HELPFUL?

02:35PM 14 MR. LEMENS: WE'RE BACK TO THE BEGINNING WHICH IS I
02:35PM 15 DON'T THINK THEY JUSTIFY TAMPERING, BUT --

02:35PM 16 THE COURT: I WAS JUST GOING TO SAY IT'S THE
02:35PM 17 NOMENCLATURE I THINK NOW THAT WE'RE AT WORD "TAMPER."

02:35PM 18 AND I WAS TRYING TO LOOK AT THAT AND SAY, WELL, HOW ELSE
02:35PM 19 CAN WE USE THAT OTHER THAN TAMPER? AND THERE MIGHT BE OTHER
02:35PM 20 WORDS THAT THE GOVERNMENT CAN USE TO JUSTIFY, MODIFY,
02:35PM 21 REPROGRAMMED AND ALL OF THAT TYPE OF THING. TAMPERING IS KIND
02:35PM 22 OF PEJORATIVE AND UNTIL AND UNLESS THAT'S BEEN PROVEN.

02:35PM 23 I SUPPOSE YOU CAN ARGUE THAT IN YOUR CLOSING ARGUMENT.
02:35PM 24 THE EVIDENCE AND THE GOVERNMENT'S BELIEF SHOWS THAT IT WASN'T
02:35PM 25 MODIFIED, IT WAS TAMPERED, AND THAT'S HOW YOU SHOULD LOOK AT

02:35PM 1 IT, ET CETERA. SOMETHING LIKE THAT.

02:35PM 2 OKAY. THANKS VERY MUCH. THANK YOU.

02:35PM 3 MR. LEMENS: THANK YOU, YOUR HONOR.

02:36PM 4 THE COURT: I'D LIKE TO SKIP AROUND, IF WE MAY, FROM
02:36PM 5 THE ORDER. I HOPE THAT'S -- I'D LIKE TO COVER A COUPLE THAT
02:36PM 6 I'M HOPING MIGHT NOT TAKE TOO MUCH TIME, BUT, OF COURSE,
02:36PM 7 WHATEVER TIME WE NEED WE'LL TAKE FOR IT.

02:36PM 8 IN THAT VEIN, I WONDER IF WE SHOULD TALK ABOUT NUMBER 6,
02:37PM 9 WHICH IS THE GOVERNMENT'S NUMBER 7 TO ADMIT TEXT MESSAGES.

02:37PM 10 MS. SAHARIA: THAT'S FINE, YOUR HONOR.

02:37PM 11 THE COURT: MR. LEACH, GOOD AFTERNOON.

02:37PM 12 MR. LEACH: GOOD AFTERNOON.

02:37PM 13 THIS IS THE GOVERNMENT'S MOTION TO ADMIT EXCERPTS OF
02:37PM 14 CERTAIN SPREADSHEETS OF TEXT MESSAGES FROM THE DEFENDANT.

02:37PM 15 JUST TO GIVE SOME CONTEXT, IN A PARALLEL S.E.C.
02:37PM 16 INVESTIGATION AND IN THE UNDERLYING GRAND JURY INVESTIGATION
02:37PM 17 THE DEFENDANT THROUGH HER COMPANY PRODUCED TWO SPREADSHEETS IN
02:37PM 18 RESPONSE TO SUBPOENAS SEEKING HER COMMUNICATIONS WITH
02:37PM 19 MR. BALWANI AND TEXTS SENT ON PHONES PAID FOR BY THERANOS AND
02:37PM 20 USED BY HOLMES OR BALWANI.

02:37PM 21 HER ATTORNEYS HELD THEM OUT OR HELD ONE OF THEM OUT AS A
02:38PM 22 SPREADSHEET REFLECTING TEXT MESSAGES SENT TO AND FROM
02:38PM 23 MS. HOLMES AND MR. BALWANI AS COLLECTED FROM MS. HOLMES'S
02:38PM 24 COMPANY ISSUED DEVICES.

02:38PM 25 THROUGH OUR MOTION WE'RE SEEKING ADMISSION OF PORTIONS OF

02:38PM 1 THOSE SPREADSHEETS FROM SIX PARTICULAR DATES BETWEEN NOVEMBER
02:38PM 2 OF 2013 AND OCTOBER OF 2015. THESE DATES CORRELATE TO EVENTS
02:38PM 3 LIKE DR. ROSENDORFF'S DEPARTURE FROM THERANOS, WHICH WE HAVE
02:38PM 4 BEEN TALKING A LOT ABOUT, THE CMS INSPECTION, WHICH WE'VE
02:38PM 5 TALKED ABOUT YESTERDAY, AND CERTAIN INTERVIEWS THAT MS. HOLMES
02:38PM 6 HAD WITH PUBLICATIONS.

02:38PM 7 AS I UNDERSTAND IT THERE ARE TWO OBJECTIONS TO THIS
02:38PM 8 EVIDENCE, AUTHENTICITY AND RELEVANCE.

02:38PM 9 WE LAY OUT THE REASONS WHY THESE DOCUMENTS ARE CLEARLY
02:38PM 10 AUTHENTIC IN OUR BRIEF. I WANT TO HIGHLIGHT JUST ONE POINT,
02:38PM 11 WHICH IS WITH RESPECT TO THE S.E.C. SPREADSHEET, HER ATTORNEYS
02:38PM 12 PRODUCED IT TO THE S.E.C. ON JULY 7TH. FIVE DAYS LATER WITH
02:39PM 13 SOME OF THOSE SAME ATTORNEYS SITTING NEXT TO HER, THE DEFENDANT
02:39PM 14 SWORE UNDER OATH THAT SHE HAD NO REASON TO DOUBT THOSE WERE
02:39PM 15 WHAT THEY WERE. SHE WAS ASKED QUESTIONS ABOUT SOME OF THOSE
02:39PM 16 TEXTS AND ANSWERED THOSE QUESTIONS.

02:39PM 17 AND WITH RESPECT TO AUTHENTICITY THE BURDEN HERE IS
02:39PM 18 SLIGHT. WE DON'T NEED TO PROVE BEYOND A REASONABLE DOUBT THAT
02:39PM 19 THESE SPREADSHEETS ARE AUTHENTIC. THERE'S ZERO DOUBT THAT THEY
02:39PM 20 ARE WHAT THEY PURPORT TO BE. IF THE DEFENSE WANTS TO ARGUE
02:39PM 21 THAT, THEY CAN TO THE JURY.

02:39PM 22 OUR BURDEN OF FLIGHT ON AUTHENTICITY IS, IS THERE SOME
02:39PM 23 EVIDENCE TO SUPPORT A FINDING? AND WE THINK FOR THE REASONS
02:39PM 24 LAID OUT IN OUR BRIEF THERE'S ZERO DOUBT THAT THESE ARE WHAT
02:39PM 25 THEY PURPORT TO BE.

02:39PM 1 THE SECOND OBJECTION IS RELEVANCE, AND AGAIN, THIS IS A
02:39PM 2 LOW BURDEN FOR THE GOVERNMENT. I THINK THE RELEVANCE IS
02:39PM 3 SELF-EVIDENT FROM SOME OF THE STATEMENTS BACK AND FORTH,
02:39PM 4 PARTICULARLY WHEN YOU CORRELATE THEM TO THE TIME. THESE WERE
02:39PM 5 SIGNIFICANT EVENTS FROM THE COMPANY. THESE REFLECT THE
02:40PM 6 CONTEMPORANEOUS BACK AND FORTH IN THEIR PRIVATE COMMUNICATIONS.
02:40PM 7 I THINK THE RELEVANCE IS EVIDENT FROM SOME OF THE WORDS USED
02:40PM 8 "OUR LAB IS A DISASTER, WE NEED TO REBUILD," PRAYING DURING THE
02:40PM 9 INSPECTION, AND I THINK THE INFERENCES ARE QUITE OBVIOUS. I
02:40PM 10 DON'T HAVE ANYTHING FURTHER FROM THE GOVERNMENT UNLESS THE
02:40PM 11 COURT HAS QUESTIONS.

02:40PM 12 THE COURT: MS. SAHARIA, ARE YOU RISING TO THIS?

02:40PM 13 MS. SAHARIA: YES. SO, YOUR HONOR, I HEARD
02:40PM 14 MR. LEACH SAY THAT THE DEFENDANT PRODUCED THESE SPREADSHEETS
02:40PM 15 AND THAT HER ATTORNEYS PRODUCED THEM.

02:40PM 16 I THINK THAT REFLECTS A MISUNDERSTANDING THAT WE SEE
02:40PM 17 ACTUALLY ACROSS A NUMBER OF THE GOVERNMENT MOTIONS THAT WE'RE
02:40PM 18 GOING TO DISCUSS TODAY ABOUT THE ROLE OF COMPANY COUNSEL. IT'S
02:40PM 19 BLACK LETTER LAW UNDER THE FAMOUS SUPREME COURT CASE UPJOHN
02:40PM 20 THAT WHEN COMPANY COUNSEL REPRESENTS A COMPANY, THEY DO NOT
02:40PM 21 REPRESENT THE EMPLOYEES OF THAT COMPANY. THAT'S WHY WHEN WE
02:40PM 22 REPRESENT COMPANIES, WE GIVE UPJOHN WARNINGS TO CORPORATE
02:41PM 23 EMPLOYEES.

02:41PM 24 WILMER HALE DID NOT REPRESENT MS. HOLMES. WILMER HALE WAS
02:41PM 25 THERANOS'S COUNSEL, MONTHS MS. HOLMES'S COUNSEL. SO THAT'S

02:41PM 1 JUST TO CLARIFY THE RECORD.

02:41PM 2 THE COURT: THANK YOU. DID MS. HOLMES'S, DID YOUR
02:41PM 3 CLIENT RATIFY OR OTHERWISE ENDORSE THIS TRANSCRIPT, THIS
02:41PM 4 SPREADSHEET RATHER SUCH THAT THE AUTHENTICATION ISSUE IS NOT
02:41PM 5 BEFORE US?

02:41PM 6 MS. SAHARIA: I DON'T BELIEVE SO. SHE WAS PRESENTED
02:41PM 7 WITH HUNDREDS OF PAGES OF PRINTOUTS FROM THE SPREADSHEET DURING
02:41PM 8 HER DOING AND SHE SAID SHE HAD NEVER SEEN IT BEFORE.

02:41PM 9 SHE WAS THEN ASKED, DO YOU HAVE ANY REASON TO BELIEVE IT
02:41PM 10 IS NOT A COLLECTION OF TEXT MESSAGES? AND SHE SAID NO, BUT, OF
02:41PM 11 COURSE, SHE HAD NO TIME TO COMPARE THAT DOCUMENT TO HER PHONE,
02:41PM 12 TO HER COMPUTER TO DETERMINE WHETHER IT WAS IN FACT AUTHENTIC.

02:41PM 13 AGAIN, I DON'T KNOW HOW YOU COULD EXPECT SOMEONE TO DO
02:41PM 14 THAT WITH MULTIPLE HUNDREDS OF PAGES OF SPREADSHEETS SITTING
02:42PM 15 THERE ON THE FLY SO --

02:42PM 16 THE COURT: WOULD THE GOVERNMENT HAVE TO CALL
02:42PM 17 KATIE MORAN TO TESTIFY AS TO THE AUTHENTICITY?

02:42PM 18 MS. SAHARIA: I THINK THEY MAY, YOUR HONOR, IF THEY
02:42PM 19 WANT TO PUT THIS INTO EVIDENCE BECAUSE IT'S NOT CLEAR AT ALL
02:42PM 20 HOW THIS WAS COMPILED.

02:42PM 21 KATIE MORAN SAYS AT -- THIS IS GOVERNMENT'S EXHIBIT I
02:42PM 22 WHICH IS 588-10. SHE CERTIFIED THAT THIS DOCUMENT IS A
02:42PM 23 SPREADSHEET OF TEXT MESSAGES, IMESSAGES, AND SKYPE EXCHANGES
02:42PM 24 PULLED APPARENTLY FROM DIFFERENT DEVICES, DIFFERENT PHONES, A
02:42PM 25 COMPUTER, AND THEN KIND OF MADE INTO SOME HYBRID DOCUMENT OF

02:42PM 1 ALL OF THOSE DIFFERENT SOURCES.

02:42PM 2 WE DON'T KNOW HOW THEY ENSURED THEY COLLECTED ALL OF THEM.
02:42PM 3 WE DON'T KNOW HOW THEY INSURED THAT THEY COLLECTED ALL OF THE
02:42PM 4 ONES BETWEEN MS. HOLMES AND MR. BALWANI, MEANING SOME MIGHT BE
02:42PM 5 MISSING.

02:42PM 6 AND THIS DECLARATION FROM MS. MORAN, ALTHOUGH IT PURPORTS
02:43PM 7 TO BE A DECLARATION CERTIFYING RECORDS OF REGULARLY CONDUCTED
02:43PM 8 BUSINESS ACTIVITY, IT'S CLEARLY NOT A PROPER BUSINESS RECORD
02:43PM 9 CERTIFICATION UNDER RULE 803(6) A BUSINESS RECORD CERTIFICATION
02:43PM 10 MUST ESTABLISH THAT THE BUSINESS RECORD WAS MADE AT OR NEAR
02:43PM 11 THE TIME BY OR FROM INFORMATION TRANSMITTED BY SOMEONE WITH
02:43PM 12 KNOWLEDGE. THE RECORD WAS KEPT IN THE COURSE OF REGULARLY
02:43PM 13 CONDUCTED ACTIVITY OF A BUSINESS, AND MAKING THE RECORD WAS A
02:43PM 14 REGULAR PRACTICE OF THAT BUSINESS.

02:43PM 15 HER CERTIFICATION ESTABLISHES NONE OF THOSE THINGS. SHE'S
02:43PM 16 NOT SOMEONE THAT WOULD HAVE KNOWLEDGE OF THOSE BECAUSE SHE WAS
02:43PM 17 NOT A COMPANY EMPLOYEE. AND WE KNOW THIS PARTICULAR DOCUMENT
02:43PM 18 WAS CREATED FOR LITIGATION THAT WAS, AS I MENTIONED, A
02:43PM 19 COMPILATION OF DIFFERENT THINGS PREPARED FOR THE S.E.C. AND
02:43PM 20 LITIGATION.

02:43PM 21 SO I DON'T THINK IT'S A BUSINESS RECORD. SO I THINK IF
02:43PM 22 THE GOVERNMENT WANTS TO AUTHENTICATE IT, THEY'RE GOING TO HAVE
02:43PM 23 TO CALL SOMEONE TO ESTABLISH A CHAIN OF CUSTODY SO WE KNOW HOW
02:44PM 24 IT WAS MADE.

02:44PM 25 THAT'S AUTHENTICITY. AS TO RELEVANCE, THE GOVERNMENT

02:44PM 1 PURPORTS TO BE ASKING IN ITS MOTION FOR A BLANKET RULING
02:44PM 2 ADMITTING THE TEXT MESSAGES THAT THEY IDENTIFY AND ALL SIMILAR
02:44PM 3 TEXT MESSAGES.

02:44PM 4 OF COURSE, WE DON'T DISPUTE THAT SOME COULD BE RELEVANT.
02:44PM 5 SOME MAY NOT BE RELEVANT. SOME ARE RELEVANT IF THE GOVERNMENT
02:44PM 6 LAYS A FOUNDATION. SOME DEPEND ON THE COURT'S RULINGS ON THE
02:44PM 7 MOTIONS IN LIMINE.

02:44PM 8 SO WE WOULD SUBMIT THAT IF THE GOVERNMENT CAN'T
02:44PM 9 AUTHENTICATE THOSE AT TRIAL, IT CAN THEN TRY TO LAY THE
02:44PM 10 FOUNDATION FOR THE TEXT MESSAGES THAT ARE RELEVANT, AND WE CAN
02:44PM 11 TAKE THEM UP IN TURN THROUGHOUT TRIAL.

02:44PM 12 THE COURT: I DON'T THINK MR. LEACH, WHEN IT SAID
02:44PM 13 "ALL SIMILAR," HE WAS ASKING FOR A BLANKET WITHOUT PROPER
02:44PM 14 FOUNDATION.

02:44PM 15 WHAT I READ INTO THAT WAS ALL, BUT HAVE A PROPER
02:44PM 16 FOUNDATION THAT WE CAN PRESENT TO THE COURT.

02:44PM 17 WAS THAT -- WAS I CORRECT IN THAT?

02:44PM 18 MR. LEACH: THAT'S FAIR, YOUR HONOR. I THINK THE
02:44PM 19 POINT OF MY LANGUAGE THERE IS THAT WE'RE GOING TO WANT MORE OF
02:45PM 20 THE TEXT MESSAGES IN, BUT I WANTED TO GIVE THE COURT A FLAVOR
02:45PM 21 OF THE RELEVANCE AND THE SIGNIFICANCE OF THESE.

02:45PM 22 IF I COULD JUST RESPOND BRIEFLY TO MY FRIEND.

02:45PM 23 THE COURT: YES.

02:45PM 24 MR. LEACH: IT'S NOT ME WHO IS DRAWING THE
02:45PM 25 CONCLUSION. WILMER HALE WAS REPRESENTING MS. HOLMES. THIS IS

02:45PM 1 WHAT WILMER HALE SAID ON THE RECORD AT 588-9. WHEN ASKED WHO
02:45PM 2 HE REPRESENTS, MR. DAVIES, THAT'S SOMEONE FROM WILMER HALE,
02:45PM 3 SAYS I REPRESENT THE COMPANY AND MS. HOLMES AS THE CEO.

02:45PM 4 MS. HOLMES WAS CEO AT THE TIME. SHE HIRED WILMER HALE.
02:45PM 5 THE IDEA THAT SHE DID NOT RATIFY OR AUTHORIZE THESE PRODUCTIONS
02:45PM 6 TO THE S.E.C. IS, FRANKLY, IN THE GRAND JURY, IS, FRANKLY,
02:45PM 7 PREPOSTEROUS.

02:45PM 8 THESE WERE NOT PREPARED FOR LITIGATION. THESE WERE
02:45PM 9 PREPARED IN RESPONSE TO SUBPOENAS FROM THE GOVERNMENT. IT
02:45PM 10 WASN'T AT THE TIME THAT THERE WAS LITIGATION PENDING. THIS WAS
02:45PM 11 SAYING GIVE US ALL OF THE TEXTS, AND THIS IS WHAT THEY GAVE US.
02:46PM 12 SO THIS WASN'T PREPARED FOR SOME LITIGATION PURPOSE.

02:46PM 13 AND WE'VE TALKED A LOT ABOUT MINI TRIALS. I DON'T WANT TO
02:46PM 14 HAVE MINI TRIES OVER AUTHENTICATION. AND PART OF THE REASON
02:46PM 15 FOR THE GOVERNMENT PRESENTING THIS IS WE REALLY WANT TO AVOID
02:46PM 16 WHAT I THINK IS OBVIOUS. THIS IS WHAT IT PURPORTS TO BE.

02:46PM 17 WE'RE NOT OFFERING THIS AS A BUSINESS RECORD, YOUR HONOR.
02:46PM 18 SO MS. MORAN NOT MEETING ALL OF THE ELEMENTS OF THE BUSINESS
02:46PM 19 RECORDS EXCEPTION AND THE AUTHENTICATION DECLARATION IS NEITHER
02:46PM 20 HERE NOR THERE. THESE ARE ADMISSIONS BY THE DEFENDANTS. THESE
02:46PM 21 ARE STATEMENTS BY A COCONSPIRATOR. SO I DON'T THINK WE NEED TO
02:46PM 22 ANALYZE THIS AS A BUSINESS RECORD OF THERANOS. AND FOR THOSE
02:46PM 23 REASONS, WE URGE THE COURT TO GRANT THE MOTION.

02:46PM 24 THE COURT: MS. SAHARIA.

02:46PM 25 MS. SAHARIA: I WOULD JUST NOTE THAT IF THEY'RE NOT

02:46PM 1 USING THIS DECLARATION AS A BUSINESS RECORDS CERTIFICATION,
02:46PM 2 THEN IT'S HEARSAY JUST LIKE ALL OF THE OTHER LETTERS FROM
02:46PM 3 HEARSAY PURPORTING TO AUTHENTICATE THE TEXT MESSAGES.

02:46PM 4 THE COURT: I THOUGHT ABOUT THAT. AND WHAT ABOUT
02:46PM 5 THE COCONSPIRATOR EXCEPTION? DOES THAT LIE IN HERE AT ALL? DO
02:47PM 6 THEY COME IN FOR THAT?

02:47PM 7 MS. SAHARIA: I DON'T THINK THAT HAS ANYTHING TO DO
02:47PM 8 WITH AUTHENTICITY, YOUR HONOR. THAT POTENTIALLY COULD HAVE TO
02:47PM 9 DO WITH THE ADMISSIBILITY OF THE STATEMENTS FROM MR. BALWANI
02:47PM 10 THAT ARE CONTAINED WITHIN THE TEXT MESSAGES.

02:47PM 11 SO I DO THINK THAT THAT COULD GO TO WHETHER THEY'RE
02:47PM 12 ADMISSIBLE UNDER A HEARSAY EXCEPTION, BUT I DON'T THINK THAT
02:47PM 13 SOLVES THE AUTHENTICITY ISSUE.

02:47PM 14 THE COURT: OKAY. ONE THING IS WHEN I LOOKED
02:47PM 15 THROUGH THE SPREADSHEET, I THINK IT MIGHT BENEFIT WHEN WE GET
02:47PM 16 TO THAT POINT AT TRIAL TO -- IF THIS DOES COME IN AND SOME OF
02:47PM 17 THEM DO COME IN, IT MIGHT BENEFIT, AND I'M SURE YOU'LL WORK ON
02:47PM 18 THE FORMAT, THERE'S SOME TYPE OF TIME STAMPING AND I
02:47PM 19 UNDERSTAND -- I DON'T REALLY UNDERSTAND HOW TEXTS WORK, BUT I
02:47PM 20 UNDERSTAND THAT SOMETIMES THEY DON'T TIME STAMP SEQUENTIALLY.
02:47PM 21 THERE'S A BREAK OR SOMETHING. SO IT MIGHT BENEFIT.

02:47PM 22 MR. LEACH: WE'RE HAPPY TO WORK WITH THE OTHER SIDE
02:47PM 23 ON THAT, YOUR HONOR. THANK YOU.

02:47PM 24 THE COURT: OKAY. THANK YOU.

02:47PM 25 MS. SAHARIA: THANK YOU.

02:47PM 1 THE COURT: GREAT. THANK YOU. THIS IS UNDER
02:48PM 2 SUBMISSION.

02:48PM 3 SHALL WE TRY 564 AND SEE WHAT WE CAN DO? I KNOW WE ARE
02:48PM 4 GETTING CLOSE TO THE TOP OF THE HOUR, AND I WANT TO GIVE PEOPLE
02:48PM 5 A BREAK. WE'VE BEEN GOING TWO HOURS IN ABOUT TEN MINUTES, BUT
02:48PM 6 MAYBE WE CAN START THIS.

02:48PM 7 MS. SAHARIA: THAT'S FINE, YOUR HONOR.

02:48PM 8 THE COURT: MR. LEMENS.

02:48PM 9 MR. LEMENS: ANDREW LEMENS FOR MS. HOLMES. THANK
02:48PM 10 YOU, YOUR HONOR.

02:48PM 11 WHAT WE'RE DEALING WITH HERE IS THREE CATEGORIES OF THE
02:48PM 12 GOVERNMENT'S 404(B) NOTICE THAT RELATE TO PRACTICES WITHIN
02:48PM 13 THERANOS'S CLINICAL LABORATORY.

02:48PM 14 FIRST, AND JUST BRIEFLY TO DESCRIBE THE PRACTICES, HOW
02:48PM 15 RESULTS WERE CALCULATED FROM THE TSPU. SO THIS IS A DEVICE
02:49PM 16 THAT TAKES SIX MEASUREMENTS. IT THEN -- THOSE MEASUREMENTS
02:49PM 17 WERE THEN RUN THROUGH A SERIES OF STATISTICAL TOOLS OR
02:49PM 18 ALGORITHMS. THOSE ALGORITHMS WERE DESIGNED BY PEOPLE MUCH
02:49PM 19 SMARTER THAN ME AND PH.D.'S IN THE FIELD. AND THEN THAT
02:49PM 20 RESULT, A SINGLE RESULT, THAT COULD BE REPORTED TO A PATIENT OR
02:49PM 21 A PHYSICIAN.

02:49PM 22 THAT PRACTICE WAS ENDORSED BY THE FDA IN 2015 WHEN IT
02:49PM 23 APPROVED THERANOS'S DEVICE TO RUN AN HSB1 ASSAY. THAT
02:49PM 24 INFORMATION WAS PRESENT TO THE FDA IN THE APPLICATION AND THAT
02:49PM 25 IS AT DOCKET 725 AT PAGE 74. THAT WAS THE BASIS FOR THE

02:49PM 1 SUBSEQUENT APPROVAL.

02:49PM 2 THE SECOND PRACTICE WE'RE TALKING ABOUT IS HOW REFERENCE
02:49PM 3 RANGES FOR THERANOS'S TESTS WERE ESTABLISHED. SO REFERENCE
02:49PM 4 RANGES BEING THE RANGE OF NORMAL RESULTS YOU WOULD EXPECT TO
02:49PM 5 SEE IN A HEALTHY PATIENT. THAT IS INFORMATION THAT IS PROVIDED
02:50PM 6 AS CONTEXT FOR THE RESULTS WHEN IT WAS RECORDED.

02:50PM 7 THERE'S OBVIOUSLY A PROCESS BY WHICH YOU SET THOSE FOR A
02:50PM 8 PARTICULAR TEST ON A PARTICULAR DEVICE, AND THEN THEY ARE
02:50PM 9 ADJUSTED OVER TIME AS MORE DATA COMES IN FROM THE TESTING
02:50PM 10 PLACE.

02:50PM 11 THE THIRD PRACTICE BEING THE CONTENT OF THE REPORT THAT
02:50PM 12 WAS PROVIDED TO PATIENTS AND PHYSICIANS WITH TEST RESULTS. I
02:50PM 13 ASSUME ALL OF US AT SOME POINT HAVE RECEIVED ONE OF THESE
02:50PM 14 REPORTS. THERE'S OBVIOUSLY THE RESULTS FROM THE TESTING. THE
02:50PM 15 QUESTION THAT I THINK THE GOVERNMENT RAISES IS WHAT ELSE SHOULD
02:50PM 16 HAVE, MUST HAVE, COULD HAVE BEEN INCLUDED?

02:50PM 17 THE GOVERNMENT, I THINK, CONTENDS THAT THESE ARE IMPROPER.
02:50PM 18 OUR SUBMISSION IS THAT THEY ARE CORE SCIENTIFIC TECHNICAL AND A
02:50PM 19 SPECIALIZED KNOWLEDGE. THAT'S CONTEMPLATED BY RULE 702 AND
02:50PM 20 THAT THEIR DISCLOSURES TO DATE ARE INSUFFICIENT TO PRESENT THIS
02:51PM 21 EVIDENCE AT TRIAL.

02:51PM 22 THERE'S A LACK OF THE INDUSTRY STANDARD OR THE SCIENTIFIC
02:51PM 23 FIELD IN WHICH THESE OF PRACTICES EXIST IN THE DISCLOSURES.
02:51PM 24 HERE WE'RE TALKING AGAIN ABOUT DR. ROSENDORFF'S DISCLOSURES.
02:51PM 25 HE'S THE LABORATORY DIRECTOR.

02:51PM 1 THE GOVERNMENT CONCEDES IT WILL NOT TRY TO COMPARE THE
02:51PM 2 THIRD PRACTICE REGARDING REPORTING TEST RESULTS TO INDUSTRY
02:51PM 3 STANDARDS, AND I THINK THE COURT SHOULD HOLD THE GOVERNMENT TO
02:51PM 4 THAT CONCESSION IN AN ORDER.

02:51PM 5 AND AS TO THE OTHER TWO PRACTICES, YOU DON'T SEE THAT IN
02:51PM 6 THEIR DISCLOSURES TO DATE, BOTH IN DR. ROSENDORFF'S EXPERT
02:51PM 7 DISCLOSURES AND THE STATEMENTS HE HAS OTHERWISE GIVEN TO THE
02:51PM 8 GOVERNMENT.

02:51PM 9 THE SECOND AND I THINK THE BIGGER PROBLEM IS THAT THE
02:51PM 10 GOVERNMENT LACKS SUFFICIENT OPINIONS FOR THE DEFENSE TO TEST
02:51PM 11 THEM OR FOR THE COURT TO TEST THEM AS PART OF ITS GATEKEEPING
02:51PM 12 FUNCTION.

02:51PM 13 TAKE THE FIRST PRACTICE RELATED TO CALCULATING RESULTS ON
02:52PM 14 THE TSPU. DR. ROSENDORFF, AND THIS IS AT 580-4 WHICH IS
02:52PM 15 DEFENSE EXHIBIT 5 AT PAGE 13, DR. ROSENDORFF'S OPINION IN
02:52PM 16 TOTAL, THIS PROCESS WAS NOT IDEAL BECAUSE IT MAY HAVE TENDED TO
02:52PM 17 INCREASE THE APPEARANCE OF PRECISION BEYOND THE LAB TEST'S TRUE
02:52PM 18 PERFORMANCE. IT WOULD HAVE BEEN BETTER TO RUN A GIVEN ASSAY
02:52PM 19 ONLY ONCE USING A METHOD WITH MAXIMUM ACCURACY OF PRECISION.
02:52PM 20 THAT'S IT.

02:52PM 21 THERE'S NO METHODOLOGY FOR HOW HE REACHED THIS CONCLUSION,
02:52PM 22 THERE'S NO UNDERSTANDING WHAT DATA HE RELIED ON, AND IT'S AN
02:52PM 23 AFTER-THE-FACT ANALYSIS.

02:52PM 24 WE KNOW THIS COULD NOT HAVE BEEN BASED ON WHAT HE
02:52PM 25 EXPERIENCED AT THERANOS BECAUSE HE APPROVED OF THOSE PRACTICES

02:52PM 1 AT THE TIME WHEN HE WAS THE LABORATORY DIRECTOR. HE TOLD THE
02:52PM 2 GOVERNMENT HE DIDN'T UNDERSTAND HOW THE ALGORITHM WORKED THAT
02:52PM 3 MADE THE STATISTICAL CALCULATION.

02:52PM 4 SO IT COMES LATER IN HINDSIGHT HIS OPINION CHANGES, BUT WE
02:53PM 5 HAVE NO BASIS TO UNDERSTAND WHAT HE'S RELYING ON THROUGH THIS
02:53PM 6 NEW -- HIS NEW THINKING. THE DISCLOSURE IS INADEQUATE.
02:53PM 7 THERE'S NO CONNECTION TO WHAT HE DID. AND THE GOVERNMENT
02:53PM 8 HASN'T -- YOU KNOW, HAS HAD THESE OPINIONS OUT THERE FOR SOME
02:53PM 9 TIME. IT HAS NOT SUPPLEMENTED THEM. IT HAS NOT SOUGHT TO
02:53PM 10 SUPPLEMENT THEM.

02:53PM 11 SO IF IT'S GOING TO COME IN AT TRIAL, IF DR. ROSENDORFF IS
02:53PM 12 GOING TO BE ALLOWED TO TESTIFY, WHICH WE DON'T THINK HE SHOULD
02:53PM 13 BE AS TO THESE PRACTICES, I THINK AT THE VERY LEAST WE NEED THE
02:53PM 14 OPPORTUNITY TO TEST THEM.

02:53PM 15 NOW, I NOTE THAT YOUR HONOR HAS SCHEDULED A DAUBERT
02:53PM 16 HEARING FOR DR. MASTER. PERHAPS THAT'S AN OPPORTUNITY FOR US
02:53PM 17 TO ADDRESS THIS ISSUE AS WELL AND FURTHER FLESH OUT THE OPINION
02:53PM 18 AND -- THE BASIS AND METHODOLOGIES FOR HIS OPINIONS, BUT YOU
02:53PM 19 NEED SOMETHING MORE BEFORE THAT EVIDENCE CAN GO TO THE JURY.

02:54PM 20 THE GOVERNMENT HAS A NUMBER OF RESPONSES TO THIS ISSUE.
02:54PM 21 WE THINK THEY'RE UNAVAILING FOR THE REFERENCE RANGES IT CLAIMS
02:54PM 22 IT'S STILL INVESTIGATING THE ISSUE. WE'RE PRETTY CLOSE TO
02:54PM 23 TRIAL, AND THIS, AGAIN, HAS BEEN OUT IN THE ETHER FOR SOME
02:54PM 24 TIME. I THINK THAT RINGS A LITTLE HOLLOW.

02:54PM 25 THE GOVERNMENT TRIES TO CONVERT THESE COMPLEX AND

02:54PM 1 STATISTICAL CONCEPTS INTO WHAT IT CALLS A SIMPLE HYPOTHETICAL
02:54PM 2 ABOUT AN UNDISPUTABLE TRUTH, AND THIS IS AT DOCKET 661 AT
02:54PM 3 PAGE 3 TO 4 OF ITS OPPOSITION. THAT'S A TWO-PAGE HYPOTHETICAL
02:54PM 4 WITHOUT ANY CITATION TO LITERATURE, SCIENTIFIC REFERENCES,
02:54PM 5 TESTIMONY. I DON'T KNOW WHERE IT CAME FROM, BUT I HAVE
02:54PM 6 QUESTIONS ABOUT ITS PREMISE AND ABOUT THE ASSUMPTIONS THAT THE
02:54PM 7 GOVERNMENT IS MAKING.

02:54PM 8 AND I DON'T -- I THINK THE HYPOTHETICAL ITSELF
02:54PM 9 DEMONSTRATES THAT THIS IS CORE 702 OPINION TESTIMONY THAT NEEDS
02:55PM 10 AN EXPERT.

02:55PM 11 AND THEN FINALLY, I THINK THE GOVERNMENT SUGGESTS, WELL,
02:55PM 12 DR. ROSENDORFF CAN FILL IN THE GAPS AT TRIAL BASED ON HIS
02:55PM 13 EXPERIENCE. WE KNOW THAT EXPERIENCE COULDN'T HAVE COME FROM
02:55PM 14 THERANOS BECAUSE HE APPROVED OF THESE PRACTICES AT THE TIME.

02:55PM 15 THE GOVERNMENT CITES THE ADAMS CASE WHICH IS 760 F.3D 1332
02:55PM 16 OUT OF THE ELEVENTH CIRCUIT TO SUGGEST THAT EXPERIENCE ALONE IS
02:55PM 17 ENOUGH.

02:55PM 18 BUT EVEN ON ITS FACTS, ADAMS LOOKED AT -- THE EXPERT AT
02:55PM 19 ISSUE IN ADAMS HAD A METHODOLOGY, A DATA THAT THEY HAD
02:55PM 20 REVIEWED, AND SO I THINK IT'S DISTINGUISHABLE HERE. AND WE
02:55PM 21 DON'T HAVE THAT FOR DR. ROSENDORFF.

02:55PM 22 THE COURT: I REFERENCED THIS IN A COUPLE OF OTHER
02:55PM 23 MOTIONS, MR. LEMENS, BUT IS THIS -- COULD THIS COME IN JUST AS
02:55PM 24 FACT EVIDENCE, OBSERVATIONS OF THE LAB DIRECTOR, THIS IS HOW WE
02:55PM 25 DID THINGS AND WHEN WE DID THINGS THIS WAY, THIS IS WHAT YOU

02:56PM 1 GET? THIS IS THE SPREAD, THIS IS THE RESULT. CAN HE TESTIFY
02:56PM 2 ABOUT THAT WITHOUT MERGING INTO OR CHANGING LANES INTO A 702
02:56PM 3 POSITION?

02:56PM 4 MR. LEMENS: RIGHT. AND I THINK THIS IS GOING TO BE
02:56PM 5 AN ISSUE CLEARLY FOR DR. ROSENDORFF WE'LL ADDRESS AT TRIAL, BUT
02:56PM 6 CERTAINLY WE ARE NOT CHALLENGING HIS PERCIPIENT TESTIMONY AT
02:56PM 7 THE TIME. BUT THESE OPINION AND THIS TESTIMONY THAT THE
02:56PM 8 GOVERNMENT HAS PROFFERED WAS NOT FROM HIS TIME AT THERANOS. IT
02:56PM 9 COMES AFTER THE FACT.

02:56PM 10 THE COURT: THE EXPLANATIONS, RIGHT.

02:56PM 11 MR. LEMENS: WELL, THE SUBSEQUENT, WELL, NOW
02:56PM 12 THINKING IN RETROSPECT I HAVE A DIFFERENT VIEW. I DON'T THINK
02:56PM 13 THAT COMES IN WITHOUT A SUFFICIENT EXPERT BASIS.

02:56PM 14 IF HE WANTS TO DESCRIBE THE FACT AS HE UNDERSTOOD IT AT
02:56PM 15 THE TIME WHILE AT THE COMPANY, I DON'T THINK WE HAVE, YOU
02:56PM 16 KNOW -- WE, OF COURSE, MAY HAVE OTHER OBJECTIONS, BUT THAT'S
02:56PM 17 NOT THE ISSUE HERE.

02:56PM 18 IT'S THOSE AFTER-THE-FACT OPINIONS OR HIS ATTEMPT TO
02:57PM 19 TAKE HIS -- WITH ONE CAVEAT, THE GOVERNMENT SEEMS TO MAKE HIS
02:57PM 20 EMAILS CONTEMPORANEOUSLY AND MAYBE CONVERT THEM INTO EXPERT
02:57PM 21 TESTIMONY. AND I THINK YOU NEED A LITTLE BIT MORE FOR HIM TO
02:57PM 22 ADOPT THAT STATEMENT TO SUGGEST, YES, THIS IS THE INDUSTRY
02:57PM 23 STANDARD, THIS IS THE BASIS, IN ORDER FOR US TO LOOK AT AN
02:57PM 24 EMAIL THAT HE SENT SEVERAL YEARS AGO AND ASSUME IT'S AN EXPERT
02:57PM 25 OPINION TODAY.

02:57PM 1 THE COURT: WHO SPEAKS TO THIS? MR. BOSTIC?

02:57PM 2 MR. BOSTIC: YES, YOUR HONOR. GOOD AFTERNOON AGAIN.

02:57PM 3 LET ME TAKE THESE TOPICS OR THESE SUBJECT AREAS ONE AT A
02:57PM 4 TIME IF I MAY.

02:57PM 5 THE GOVERNMENT'S OVERALL POINT HERE IS THAT FOR THE VAST
02:57PM 6 MAJORITY OF THIS, AS THE COURT NOTED, THIS SHOULD BE SIMPLE
02:57PM 7 FACT EVIDENCE. TO THE EXTENT THAT EXPERT DISCLOSURE IS
02:57PM 8 NECESSARY, THAT DISCLOSURE HAS BEEN MADE, AND IT'S SUFFICIENT.

02:57PM 9 LET ME START WITH THE MULTIPLEXING TEST RESULTS METHOD
02:58PM 10 THAT THERANOS USED. DR. ROSENDORFF HAS EXPERIENCE AS A LAB
02:58PM 11 DIRECTOR IN MULTIPLE LOCATIONS, HE'S WORKED WITH A VARIETY OF
02:58PM 12 DIFFERENT TYPES OF DEVICES.

02:58PM 13 THE DEVICES HE WORKED WITH AT THERANOS USED A METHOD BY
02:58PM 14 WHICH ASSAYS ARE RUN MULTIPLE TIMES, RESULTS ARE GENERATED ALL
02:58PM 15 IN PARALLEL, AND THEN THE AVERAGE OF THOSE RESULTS ARE TAKEN,
02:58PM 16 AND THEN OUR UNDERSTANDING IS CERTAIN OUTLIERS, RESULTS THAT
02:58PM 17 MIGHT BE FAR AFIELD FROM THE REST, ARE DISCARDED AND NOT
02:58PM 18 INCLUDED IN THE CALCULATION.

02:58PM 19 THE END RESULT OF THIS IS THAT A MACHINE OR AN ANALYZER
02:58PM 20 CAN PRODUCE A WIDESPREAD OF RESULTS FOR ONE TEST, FOR ONE
02:58PM 21 SAMPLE INDICATING A LACK OF CONSISTENCY BUT A LIKELY LACK OF
02:58PM 22 ACCURACY AND A LACK OF RELIABILITY. IT CAN PRODUCE THOSE
02:58PM 23 VARIETY OF RESULTS BUT OUTPUT ONLY ONE.

02:58PM 24 THE METHOD OF RUNNING EACH ASSAY MULTIPLE TIMES BUT THEN
02:59PM 25 ONLY REPORTING THE AVERAGE RESULT WOULD TEND TO MASK THAT

02:59PM 1 INACCURACY IN THE RESULTS.

02:59PM 2 SO THE COURT SHOULD NOTE THAT DR. ROSENDORFF IS NOT
02:59PM 3 ADVANCING ANY CONCLUSION FROM THIS PRACTICE THAT THERE WAS
02:59PM 4 INACCURACY IN THERANOS'S LAB TEST RESULTS. THAT EVIDENCE IS
02:59PM 5 ELSEWHERE, AND THERE'S AMPLE EVIDENCE OF THE ACCURACY AND
02:59PM 6 RELIABILITY PROBLEMS THAT PLAGUED THERANOS'S TECHNOLOGY AND ITS
02:59PM 7 TESTS.

02:59PM 8 THIS FACT IS SIMPLY ABOUT A MANNER THAT WAS USED TO
02:59PM 9 CONTRIBUTE TO THE MASKING OR THE HIDING OF THE INACCURACY AND
02:59PM 10 THE VARIABILITY IN THERANOS'S TESTS, AND VARIABILITY IS A KEY
02:59PM 11 ISSUE IN THIS CASE.

02:59PM 12 COEFFICIENT OF VARIATION IS A STATISTIC OR A MEASURE OF
02:59PM 13 THE CONSISTENCY OF A LAB TEST RESULTS, AND DEFENDANT HERSELF
02:59PM 14 BOASTED ABOUT THERANOS'S REVOLUTIONARY LOW COEFFICIENT OF
03:00PM 15 VARIATION WHEN SOLICITING INVESTMENTS FROM VICTIMS IN THIS
03:00PM 16 CASE. IT IS A RELEVANT FACT FOR THE JURY TO KNOW THAT THE
03:00PM 17 METHODS THAT THERANOS USED BY DEFINITION WOULD TEND TO MASK
03:00PM 18 HIGHER VARIABILITY IN THEIR LAB TEST RESULTS.

03:00PM 19 AS FAR AS METHODOLOGY FOR CONCLUDING THAT, THE OPINION
03:00PM 20 REALLY IS AS SIMPLE AS IT SEEMS. IT DOES REQUIRE HYPOTHETICALS
03:00PM 21 POSSIBLY TO UNDERSTAND IT WELL, BUT IT SIMPLY IS A FACT OF HOW
03:00PM 22 THIS WOULD WORK. IT DOESN'T REQUIRE DETAILED KNOWLEDGE OF THE
03:00PM 23 PRECISE ALGORITHM OR ANY KIND OF STUDY OF DATA TO BE CONDUCTED.
03:00PM 24 IT'S JUST A FACT THAT DR. ROSENDORFF CAN EXPLAIN THAT USING
03:00PM 25 THIS METHOD WOULD TEND TO CONCEAL VARIABILITY IN THESE LIVE

03:00PM 1 TEST RESULTS.

03:00PM 2 THE FACT THAT HE REACHED THIS OPINION AFTER LEAVING
03:00PM 3 THERANOS, I STRUGGLE TO SEE THE RELEVANCE OF THAT OR WHY THAT
03:00PM 4 IS A HINDRANCE TO ITS ADMISSIBILITY.

03:01PM 5 DR. ROSENDORFF IS WELL POSITIONED TO MAKE THAT CONCLUSION.
03:01PM 6 HE WAS THERE AT THERANOS WORKING WITH THESE ANALYZERS, AND SO
03:01PM 7 HE'S CERTAINLY QUALIFIED TO UNDERSTAND HOW THEY WORKED.

03:01PM 8 HIS GENERAL LAB DIRECTOR EXPERIENCE GIVES HIM A BASIS ON
03:01PM 9 WHICH TO OPINE ABOUT HOW THEY RELATED TO OTHER CONVENTIONAL
03:01PM 10 MACHINES AND THE FACT THAT HE NOW BELIEVES THAT THERANOS'S
03:01PM 11 APPROACH WAS, AS HE SAYS NOT IDEAL, THAT IT CREATED THIS RISK
03:01PM 12 OF HIDING INCONSISTENCY, THAT OPINION IS ADMISSIBLE BECAUSE
03:01PM 13 IT'S THE OPINION THAT HE HOLDS TODAY. IT'S HIS CURRENT VIEW.
03:01PM 14 THERE'S NO REASON THAT HE SHOULD BE DISQUALIFIED FROM GIVING
03:01PM 15 THAT OPINION BECAUSE HE'S ONLY SAID IT RECENTLY.

03:01PM 16 THERE'S ALSO EVIDENCE THAT WHEN DR. ROSENDORFF WAS LAB
03:01PM 17 DIRECTOR AT THERANOS, HIS VIEWS WERE FREQUENTLY OVERRULED OR
03:01PM 18 OVERRIDDEN BY DEFENDANT AND MR. BALWANI IN PARTICULAR.

03:02PM 19 SO IT'S PROBLEMATIC FOR THE DEFENSE TO SAY THAT THE JURY
03:02PM 20 SHOULD NOT HEAR ANY CRITICISM OF THERANOS'S METHODS FROM
03:02PM 21 DR. ROSENDORFF BECAUSE HE APPROVED THEM AT THE TIME.

03:02PM 22 WELL, WHEN HE WAS THERE, HE RAISED CONCERNS, HE WAS SHOT
03:02PM 23 DOWN, AND EVENTUALLY HE WAS FORCED TO LEAVE THE COMPANY, AND AS
03:02PM 24 A RESULT IT'S NOT SURPRISING AT ALL THAT HE NOW, NOT IN
03:02PM 25 RETROSPECT BUT IN LIGHT OF HIS VIEWS AT THE TIME, HE WOULD HAVE

03:02PM 1 PROBLEMS WITH SEVERAL OF THERANOS'S APPROACHES.

03:02PM 2 SO UNLESS THE COURT HAS CONCERNS ABOUT THE FIRST TOPIC,
03:02PM 3 I'LL MOVE TO THE NEXT.

03:02PM 4 THE COURT: NO.

03:02PM 5 MR. BOSTIC: AS TO THE SECOND TOPIC REGARDING
03:02PM 6 REFERENCE RANGES, I SHOULD START BY JUST CLARIFYING WHAT THE
03:02PM 7 GOVERNMENT PRESENTLY INTENDS TO OFFER ON THAT TOPIC.

03:02PM 8 HERE REFERENCE RANGES ARE A RANGE OF NORMAL VALUES
03:02PM 9 ASSOCIATED WITH A PARTICULAR ASSAY. SO WHEN A PATIENT RECEIVES
03:03PM 10 A RESULT, THE LAB ALSO WILL FIND A REFERENCE RANGE SO THAT THE
03:03PM 11 PATIENT CAN DETERMINE WHETHER THAT RESULT IS IN THE NORMAL
03:03PM 12 RANGE OR NOT.

03:03PM 13 AT TRIAL THERE WILL BE SUBSTANTIAL EVIDENCE ABOUT THE
03:03PM 14 EQUIVALENCE OR REALLY LACK OF EQUIVALENCE BETWEEN BLOOD SAMPLES
03:03PM 15 DRAWN FROM THE VEIN AND BLOOD SAMPLES TAKEN FROM A FINGERSTICK.

03:03PM 16 THERE WAS AN ACTIVE AND ONGOING DISPUTE BETWEEN
03:03PM 17 DR. ROSENDORFF AND THE DEFENDANTS IN THIS CASE ABOUT WHETHER
03:03PM 18 THOSE TWO TYPES OF SAMPLES COULD BE TREATED EQUIVALENTLY, AND
03:03PM 19 THE COURT WILL HEAR THAT TESTIMONY, AND THE JURY WILL HEAR THAT
03:03PM 20 TESTIMONY.

03:03PM 21 IN PARTICULAR, DR. ROSENDORFF IS EXPECTED TO TESTIFY THAT
03:03PM 22 HE WOULD HAVE PREFERRED TO HAVE SEPARATE REFERENCE RANGES FOR
03:03PM 23 FINGERSTICK SAMPLES VERSUS VEIN DRAW SAMPLES. AND HE CAN
03:03PM 24 EXPLAIN AND HAS EXPLAINED THE DIFFERENCES BETWEEN THOSE TWO
03:03PM 25 SAMPLES AND WHY THAT IS NECESSARY, WHY THE SAME REFERENCE RANGE

03:03PM 1 CANNOT BE USED FOR SAMPLES DRAWN FROM THOSE TWO DIFFERENT
03:03PM 2 METHODS.

03:03PM 3 THE DEFENDANTS DISAGREED, AND THE INFERENCE THAT THE JURY
03:04PM 4 CAN DRAW FROM THAT IS THAT THE DEFENDANTS WERE MORE CONCERNED
03:04PM 5 WITH CONCEALING THE USE AND RELIANCE ON THIRD PARTY DEVICES,
03:04PM 6 CONCEALING THEIR RELIANCE ON VEIN DRAWS, BUT THEY WERE MORE
03:04PM 7 CONCERNED WITH THAT THAN THEY WERE WITH PROVIDING PATIENTS AND
03:04PM 8 DOCTORS WITH THE INFORMATION THAT THEY NEEDED TO RELY ON THE
03:04PM 9 TEST RESULTS THAT THERANOS WAS PROVIDING. SO THAT'S WHY THAT
03:04PM 10 IS RELEVANT.

03:04PM 11 IN ADDITION, IT'S SIMPLY FACT TESTIMONY IF DR. ROSENDORFF
03:04PM 12 TESTIFIES THAT HE FELT RUSHED LEADING UP TO THE LAUNCH, IF HE
03:04PM 13 FELT THERE WAS TIME PRESSURE ON HIM TO MOVE FORWARD WITHOUT
03:04PM 14 PUTTING AS MUCH WORK INTO THE REFERENCE RANGES AS HE WOULD HAVE
03:04PM 15 WANTED. THAT HAS, I BELIEVE, BEEN DISCLOSED AS AN OPINION, OR
03:04PM 16 IF NOT, IT'S IN HIS MEMORANDA OF INTERVIEWS. BUT THAT'S SIMPLY
03:04PM 17 FACT EVIDENCE. IT'S NOT OPINION. IT DOESN'T RELATE TO
03:04PM 18 INDUSTRY STANDARDS. IT ALL GOES TO DEFENDANT'S INTENT AND HOW
03:05PM 19 DEFENDANTS PRIORITIZED THE ACCURACY OF THE TESTS VERSUS THE
03:05PM 20 REPUTATION OF THE COMPANY, WHICH IS A KEY ISSUE IN THIS CASE.

03:05PM 21 MOVING ON TO THE THIRD ISSUE. WHEN IT COMES TO THE
03:05PM 22 INFORMATION THAT THERANOS COULD HAVE BUT DID NOT PROVIDE TO ITS
03:05PM 23 PATIENTS, THIS IS SIMPLE FACT EVIDENCE ABOUT INTENT, ABOUT
03:05PM 24 SCHEME TO DEFRAUD. THIS HAS NOTHING TO DO, AGAIN, WITH
03:05PM 25 INDUSTRY STANDARDS OR CLIA COME COMPLIANCE. THERE WILL BE

03:05PM 1 EVIDENCE IN A VARIETY OF FORMS THAT SHOWS THAT WHEN THERANOS
03:05PM 2 ENCOUNTERED PROBLEMS WITH ITS TESTS ESPECIALLY, IT TOOK GREAT
03:05PM 3 CARE IN CONCEALING SOME OF THE DETAIL SO THOSE PROBLEMS FROM
03:05PM 4 ITS CUSTOMERS.

03:05PM 5 THE EXAMPLES IN THE GOVERNMENT'S BRIEF AT DOCUMENT 661 ON
03:05PM 6 THE DOCKET MAKE IT CLEAR THAT AT VARIOUS INSTANCES THERANOS
03:06PM 7 COULD HAVE PROVIDED PATIENTS WITH INFORMATION THAT WOULD HAVE
03:06PM 8 BEEN BENEFICIAL FOR PATIENTS TO HAVE ABOUT WHY A RESULT MIGHT
03:06PM 9 DIFFER FROM ANOTHER RESULT, OR WHY A TEST MIGHT NOT BE
03:06PM 10 AVAILABLE, WHY A RESULT WAS VOIDED.

03:06PM 11 THERANOS WITHHELD THAT INFORMATION. AND IT'S FAIR FOR THE
03:06PM 12 JURY TO INFER THAT THAT WAS IN FURTHERANCE OF THE FRAUD BECAUSE
03:06PM 13 HAD THAT INFORMATION BEEN DISCLOSED, HAD THOSE PATIENTS BEEN
03:06PM 14 TOLD THAT THERANOS WAS RUNNING THE SAME TESTS, FOR EXAMPLE, ON
03:06PM 15 MULTIPLE DIFFERENT TYPES OF DEVICES, THERANOS'S RELIANCE ON
03:06PM 16 THIRD PARTY DEVICES WOULD HAVE COME OUT. AND THAT WAS A SECRET
03:06PM 17 THAT THERANOS WAS ACTIVELY WORKING TO PROTECT SO THAT PEOPLE
03:06PM 18 WOULD CONTINUE TO HAVE THE IMPRESSION THAT THERANOS HAD ONE
03:06PM 19 ANALYZER THAT COULD PERFORM ALL OF THE TESTS ON ITS MENU.

03:06PM 20 SO WHEN THERANOS MADE THE DECISION -- AND AGAIN, THESE
03:06PM 21 DECISIONS IN SEVERAL CASES CAN BE TRACED UP TO THE DEFENDANTS
03:06PM 22 IN THIS CASE. WHEN THERANOS MADE THESE DECISIONS, OR WHEN
03:06PM 23 DEFENDANTS MADE THESE DECISIONS, IT WAS WITH THE INTENT TO
03:06PM 24 FURTHER THE FRAUD, TO CONCEAL THE TRUTH, AND THAT COMES IN AS
03:07PM 25 SIMPLE FACT EVIDENCE WITHOUT THE NEED FOR AN EXPERT OPINION.

03:07PM 1 THE COURT: ALL RIGHT. MR. LEMENS.

03:07PM 2 MR. LEMENS: YOUR HONOR, I'LL BE BRIEF KNOWING THAT
03:07PM 3 I'M THE ONLY THING STANDING BETWEEN ME AND A BREAK.

03:07PM 4 SO ON THE FIRST ISSUE, DR. ROSENDORFF'S OPINION HAS
03:07PM 5 CHANGED BETWEEN THE TIME HE WAS AT THE COMPANY AND THE TIME HE
03:07PM 6 LEFT, AND I THINK WE'RE ENTITLED TO UNDERSTAND THE BASIS AND
03:07PM 7 THE METHODOLOGY FOR THIS -- NEW BELIEFS AND NEW OPINION.

03:07PM 8 ON THE REFERENCE RANGES, WHAT HE UNDERSTOOD AT THE TIME,
03:07PM 9 PERCIPIENT KNOWLEDGE, CERTAINLY I THINK YOU AND I DISCUSSED,
03:07PM 10 AND THERE MAY BE OTHER OBJECTIONS BUT THAT'S NOT THE ISSUE, BUT
03:07PM 11 IF YOU TRY TO CLOAK THAT IN THE GUISE OF EXPERT TESTIMONY OR IF
03:07PM 12 HE OFFERS AN OPINION ABOUT -- WHAT HE DOES NOT OFFER AN OPINION
03:07PM 13 SO FAR AS I'M AWARE AS WHAT IMPACT THAT COULD HAVE HAD ON THE
03:07PM 14 ACCURACY AND THE RELIABILITY OF THE TECHNOLOGY OR HOW IT
03:08PM 15 RELATES TO THE ACCURACY AND RELIABILITY OF THE TECHNOLOGY. IF
03:08PM 16 HE'S GOING TO GO TO THAT FAR, THEN AGAIN, WE NEED A BASIS AND
03:08PM 17 METHODOLOGY UNDER 702.

03:08PM 18 AND ON THE THIRD ISSUE, MR. BOSTIC SAID THAT THIS EVIDENCE
03:08PM 19 COMES IN BECAUSE IT SHOWS WHAT COULD HAVE BEEN BENEFICIAL TO
03:08PM 20 PATIENTS OR PHYSICIANS. THAT IS SPECIALIZED TECHNICAL
03:08PM 21 KNOWLEDGE WITHIN A VERY PARTICULAR FIELD.

03:08PM 22 IT'S UNCLEAR HOW THAT CONNECTS TO ACCURACY AND RELIABILITY
03:08PM 23 ISSUES WITH THE TECHNOLOGY, BUT EVEN WHAT SHOULD HAVE BEEN
03:08PM 24 INCLUDED OR MUST HAVE BEEN INCLUDED, FOR THE JURY TO HEAR THAT,
03:08PM 25 I THINK THEY NEED THE CONTEXT OF WHAT SOMEONE IN THAT INDUSTRY

03:08PM 1 OR SOMEONE IN THAT FIELD WOULD HAVE EXPECTED.

03:08PM 2 I DON'T THINK IT'S -- I THINK YOU START TO GET INTO 403
03:08PM 3 ISSUES IF THE GOVERNMENT IS SIMPLY GOING TO PUT FORWARD AND
03:08PM 4 SAY, WELL, COULD HE HAVE INCLUDED THAT? OH, AND HE DIDN'T.
03:08PM 5 OKAY. AND THEN DRAW AN IMPROPER INFERENCE.

03:08PM 6 IF THERE'S GOING TO BE A DISCUSSION OF WHAT SHOULD HAVE
03:08PM 7 BEEN INCLUDED IN THESE TEST REPORTS, IT SHOULD BE WITH A
03:08PM 8 COMPARATOR TO WHAT IS NORMALLY INCLUDED WITHIN THAT PARTICULAR
03:09PM 9 FIELD.

03:09PM 10 THE COURT: WELL, MR. BOSTIC, ARE YOU SUGGESTING
03:09PM 11 THAT THE EVIDENCE WILL BE THAT THERANOS WILLFULLY WITHHELD
03:09PM 12 TESTING INFORMATION?

03:09PM 13 MR. BOSTIC: YES, YOUR HONOR.

03:09PM 14 SO THIS ISN'T ABOUT WHAT COULD BE CHARACTERIZED AS A
03:09PM 15 NEGLIGENCE OR WELL MEANING FAILURE TO INCLUDE ADDITIONAL DETAIL.

03:09PM 16 THIS IS ABOUT ACTIVELY WITHHOLDING INFORMATION FROM
03:09PM 17 PATIENTS AND DOCTORS WITH THE GOAL OF CONCEALING THE EXISTENCE
03:09PM 18 OF THE FRAUD.

03:09PM 19 MR. LEMENS: WELL, IN A WORLD WHERE YOU'RE WORKING
03:09PM 20 IN A VERY SPECIALIZED FIELD, DO WE -- ARE WE REQUIRED TO REPORT
03:09PM 21 THIS, RIGHT? IS THIS SOMETHING THAT SHOULD BE SHARED?

03:09PM 22 THE COMPANY IS CERTAINLY ENTITLED TO MAKE A DECISION, AND
03:09PM 23 THERE COULD BE INNOCENT EXPLANATIONS. NO, WE DON'T WANT TO
03:09PM 24 CLUTTER UP OUR REPORTS. WE WANT THESE TO BE SIMPLE AND
03:09PM 25 STRAIGHTFORWARD. WE DON'T THINK THAT'S NECESSARY. THERE NEEDS

03:09PM 1 TO BE SOME SORT OF EXPLANATION TO THE JURY TO PUT THIS IN
03:09PM 2 CONTEXT.

03:09PM 3 MR. BOSTIC: IF I MAY PROVIDE AN EXAMPLE,
03:10PM 4 YOUR HONOR.

03:10PM 5 SO THIS IS IN THE GOVERNMENT'S BRIEF SO I WON'T BELABOR
03:10PM 6 THE POINT, BUT WHEN THERANOS WAS OFFERING HCG TESTS DESIGNED TO
03:10PM 7 PRIMARILY DETECT WHETHER A PATIENT IS PREGNANT OR NOT AND THE
03:10PM 8 HEALTH AND PROGRESS OF THE PREGNANCY, THERANOS ENCOUNTERED
03:10PM 9 REPEATED PROBLEMS WITH THE ACCURACY OF ITS HCG TESTS.

03:10PM 10 RATHER THAN TELL DOCTORS AND PATIENTS THAT IT WAS
03:10PM 11 EXPERIENCING PROBLEMS WITH THOSE TESTS, WHICH WOULD ALLOW
03:10PM 12 DOCTORS AND PATIENTS TO REEVALUATE RESULTS THAT THEY HAD GOTTEN
03:10PM 13 BEFORE, GO ELSEWHERE IF THEY NEEDED TESTING IN THE SHORT TERM,
03:10PM 14 THERANOS INSTEAD TOLD DOCTORS AND PATIENTS THAT THIS WAS A
03:10PM 15 TEMPORARY, QUOTE, "ROUTINE QUALITY CHECK RELATED TO THERANOS'S
03:10PM 16 EXPANDING PATIENT POPULATION."

03:10PM 17 SO THE JURY SHOULD KNOW ABOUT THAT BECAUSE THE JURY CAN
03:10PM 18 INFER FROM THAT, THAT THERANOS WAS WORKING ACTIVELY TO CONCEAL
03:10PM 19 THE PROBLEMS WITH ITS TESTS.

03:10PM 20 NOW, THIS ISN'T ABOUT WHETHER INDUSTRY STANDARD WOULD
03:10PM 21 REQUIRE THERANOS TO DISCLOSE THAT INFORMATION, AND IT'S NOT
03:11PM 22 LIKE THERE'S A REGULATION SOMEWHERE ON THE BOOK THAT REQUIRES
03:11PM 23 THAT. THAT'S WHY THERE ISN'T THE TERRITORY OF EXPERT
03:11PM 24 TESTIMONY. THIS ISN'T A REGULATORY ACTION. THIS IS ABOUT THE
03:11PM 25 INTENT OF THE DEFENDANTS AND THEIR COCONSPIRATORS IN DECIDING

03:11PM 1 TO WITHHOLD THAT INFORMATION FROM PEOPLE WHO TURNED OUT TO BE
03:11PM 2 THE VICTIMS IN THIS CASE.

03:11PM 3 THE COURT: SO, MR. LEMENS, THAT'S WHAT I WAS
03:11PM 4 REFERENCING BEFORE, THE FACT THAT THE CONDUCT THAT ACTUALLY WAS
03:11PM 5 TAKEN, AND, THAT IS, A DIFFERENT EXPLANATION WAS OFFERED I
03:11PM 6 SUPPOSE.

03:11PM 7 MR. LEMENS: SURE. I THINK IF THERE'S AN ALLEGATION
03:11PM 8 OF SOMETHING INCONSISTENT OR WITH THIS PARTICULAR EXAMPLE.

03:11PM 9 WHAT I DON'T HEAR IS THAT THEY WERE REQUIRED TO OR SHOULD
03:11PM 10 HAVE OR PUT ANY GUISE OF -- THAT THEY DID SOMETHING WRONG
03:11PM 11 COMPARED TO THE INDUSTRY, AND THAT'S I THINK WHERE OUR CONCERN
03:11PM 12 IS, IS THAT THEY'RE ASSUMING THAT YOU SHOULD HAVE DONE THIS BUT
03:11PM 13 YOU DIDN'T.

03:11PM 14 AND WHENEVER -- IF YOU'RE DEFINING WHAT AN IDEAL LAB
03:11PM 15 REPORT LOOKS LIKE OR WHAT INFORMATION SHOULD BE INCLUDED IN
03:11PM 16 THAT REPORT, THAT'S, I THINK, WHERE WE RUN INTO THIS ISSUE, AND
03:12PM 17 I THINK IT'S SOMETHING THAT WE'RE GOING TO NEED TO OR HOPEFULLY
03:12PM 18 YOUR HONOR WILL POLICE CAREFULLY AS WE PROCEED THROUGH THE
03:12PM 19 TRIAL GIVEN THE EXPERT ISSUES OF THE PREJUDICE.

03:12PM 20 THE COURT: I THINK I CAPTURE YOUR POSITION. THANK
03:12PM 21 YOU.

03:12PM 22 MR. BOSTIC: YOUR HONOR, VERY BRIEFLY.

03:12PM 23 THIS IS NOT JUST ABOUT THE CONTENT OF THE LAB REPORTS.
03:12PM 24 THIS IS ALSO ABOUT THE COMMUNICATIONS BETWEEN THERANOS STAFF
03:12PM 25 AND DOCTORS AND PATIENTS AFTER THE FACT.

03:12PM 1 THE COURT: OKAY. ALL RIGHT.

03:12PM 2 WELL, LET'S TAKE OUR AFTERNOON BREAK NOW. I THINK IT'S
03:12PM 3 TIME FOR THAT. AND I KNOW I SAID 4:00 O'CLOCK. I THOUGHT WE
03:12PM 4 WOULD RESUME MAYBE AT THE BOTTOM OF THE HOUR AND SEE WHAT WE
03:12PM 5 CAN DO.

03:12PM 6 I'M HOPEFUL THAT WE CAN GET THROUGH EVERYTHING THIS
03:12PM 7 AFTERNOON SUCH THAT WE DON'T HAVE TO CARRY OVER UNTIL TOMORROW.

03:12PM 8 DO WE THINK WE COULD DO THAT?

03:12PM 9 MS. SAHARIA: I AM SORRY, YOUR HONOR. DID YOU SAY
03:12PM 10 WE WOULD START AT 4:00 O'CLOCK?

03:12PM 11 THE COURT: NO. I SAID WE WOULD START AT THE BOTTOM
03:12PM 12 OF THE HOUR. IS THAT 3:30?

03:12PM 13 MS. SAHARIA: YEAH, FINE. THAT'S FINE, YOUR HONOR.

03:12PM 14 THE COURT: OKAY.

03:13PM 15 (RECESS FROM 3:13 P.M. UNTIL 3:36 P.M.)

03:36PM 16 THE COURT: THANK YOU. WE'RE BACK ON THE RECORD.
03:36PM 17 ALL PARTIES PREVIOUSLY PRESENT ARE PRESENT ONCE AGAIN.

03:36PM 18 WE'LL CONTINUE OUR DISCUSSION ON THE MOTIONS IN LIMINE.
03:37PM 19 LET'S TURN TO DOCKET 588. THIS IS MS. HOLMES'S MOTION TO
03:37PM 20 EXCLUDE CERTAIN NEWS ARTICLES.

03:37PM 21 MR. LOOBY: GOOD AFTERNOON, YOUR HONOR.

03:37PM 22 SO I'LL BE ADDRESSING THIS MOTION. THIS MOTION CONCERNS
03:37PM 23 ABOUT 50 OR SO ARTICLES ON THE GOVERNMENT'S EXHIBIT LIST.

03:37PM 24 THE COURT: OKAY. LET ME GIVE YOU SOME CREDIT HERE.
03:37PM 25 THIS IS PATRICK LOOBY APPEARING FOR MS. HOLMES.

MR. LOOBY: YES. SO THESE ARE 50 OR SO EXHIBITS OF NEWS ARTICLES ON THE GOVERNMENT'S EXHIBIT LIST WHOSE AUTHORS ARE NOT EXPECTED TO TESTIFY AT TRIAL BECAUSE THEY HAVE NOT BEEN DISCLOSED BY THE GOVERNMENT ON ITS WITNESS LIST.

AND I SHOULD NOTE AT THE OUTSET THAT THE TWO ARTICLES ON THE GOVERNMENT'S WITNESS LISTS BY THE TWO JOURNALISTS WHO HAVE BEEN DISCLOSED, MR. ROGER PARLOFF AND ERIC TOPEL. THIS ONE RESERVES THE RIGHT TO OBJECT TO THE INTRODUCTION OF THOSE ARTICLES AT TRIAL BECAUSE THEY ALSO POSE RULE 403 AND SOMETIMES DOUBLE HEARSAY PROBLEMS.

BUT THE REASON WE SET OUT THIS MOTION IN THIS WAY PRETRIAL IS BECAUSE AS THE CASES TEACH IN THE LAREZ VERSUS LOS ANGELES CASE OUT OF THE NINTH CIRCUIT TEACHES WHEN THE AUTHOR OF THE NEWS ARTICLE IS NOT PRESENT TO TESTIFY AT TRIAL, THERE IS A THRESHOLD HEARSAY PROBLEM WITH THE INTRODUCTION OF ANY STATEMENTS CONTAINED WITHIN THE ARTICLE, ALONG THE LINES OF A REPRESENTATION FROM THE AUTHOR THAT THE SOURCE THAT IS QUOTED ACTUALLY SAID WHAT THEY SAID.

SO ALL OF THE ARTICLES THAT WE'VE MOVED TO EXCLUDE SUFFER FROM THAT SAME FATAL FLAW, AND WE SUBMIT THAT THE MOTION IS RIPE FOR A PRETRIAL RULING THERE.

NOW, THE GOVERNMENT AGREES THAT IT CANNOT OFFER THESE ARTICLES FOR THE TRUTH OF THE MATTER ASSERTED WITHIN THEM.

IT HAS OFFERED A SERIES OF NONHEARSAY THEORIES, BUT NONE OF THESE SAVE THE EVIDENCE. I THINK THEY KIND OF CONFUSE THE

ISSUES A LITTLE BIT MATTER THAN THEY ILLUMINATE.

I'LL JUST TOUCH BRIEFLY UPON THEM, AND THEN I CAN ENTERTAIN ANY QUESTIONS THAT YOUR HONOR HAS ABOUT THE HEARSAY ISSUES.

AND THEN I WANT TO SPEAK BRIEFLY ABOUT SOME OF THE 403 ISSUES THAT THESE ARTICLES POSE FOR THE TRIAL AS WELL.

THE FIRST THEORY THAT THE GOVERNMENT POSITS IS WHAT THEY'RE CALLING KIND OF LIKE A BACKGROUND INFORMATION ABOUT THE COMPANY THEORY. AND THE WAY I READ THE GOVERNMENT'S POSITION IS THAT THIS IS SOMETHING AKIN TO A FRAUD ON THE MARKET THEORY. IN FACT, THEY'RE CITING CASES THAT APPLY THE 10(B) CIVIL FRAUD ENFORCEMENT STANDARD IN THE UNITED STATES SUPREME COURT STANDARD FROM THE BASIC CASE. THAT KIND OF PRESUMES THAT ALL INFORMATION IS PERFECTLY DISTRIBUTED IN A MARKET IN THE CIVIL CONTEXT.

AND I TAKE THIS TO MEAN IN THIS CASE THAT THE GOVERNMENT BELIEVES IT CAN OFFER ANY NEWS ARTICLE ABOUT THERANOS EVEN IF IT DOES NOT IDENTIFY ANY ALLEGED FALSEHOOD IN THE ARTICLE, EVEN IF IT DOES NOT CONNECT ANY ALLEGED FALSEHOOD TO MS. HOLMES, AND EVEN IF IT DOESN'T CONNECT A SINGLE INVESTOR OR PATIENT WHO WILL COME IN AND SAY, YEAH, I READ THIS AT THE TIME ABOUT THERANOS AND IT INFLUENCED ME IN SOME WAY.

THE GOVERNMENT HAS CITED NO CASES TO SUPPORT THE IMPOSITION OF THIS IDEA OF THE KIND OF BACKGROUND INFORMATION ABOUT THE COMPANY INTO THE CRIMINAL CONTEXT.

03:40PM 1 AND ITS RELIANCE ON JUDICIAL NOTICE CASES, I SUBMIT, SHOWS
03:40PM 2 THAT IT'S KIND OF REACHING ON THIS NONHEARSAY THEORY. THOSE
03:40PM 3 CASES HAVE NOTHING TO DO WITH THE EVIDENCE AT ISSUE HERE SO
03:41PM 4 THAT'S THE HELIOTROPE CASE AND THE VON SAHER VERSUS NORTON
03:41PM 5 SIMON MUSEUM OF ART CASE.

03:41PM 6 NOTABLY, BOTH THE COURTS IN BOTH OF THOSE DECISIONS THEY
03:41PM 7 NOTICED -- THEY WERE BOTH ARRIVED AT FOR MOTION FOR JUDGMENT ON
03:41PM 8 THE PLEADINGS IN A CIVIL MATTER OR A SIMILAR SUMMARY
03:41PM 9 ADJUDICATION. AND THE COURTS BOTH NOTICED THAT THEY WERE
03:41PM 10 CONSTRAINED TO TAKE NOTICE OF FACTS UNDER RULE 201(B) OF THE
03:41PM 11 FEDERAL RULES OF EVIDENCE AND LIMITED IT TO NOTING FACTS THAT
03:41PM 12 ARE NOT SUBJECT TO DISPUTE.

03:41PM 13 THE GOVERNMENT'S THEORY KIND OF DOESN'T HAVE ANYTHING TO
03:41PM 14 DO WITH THOSE PRINCIPLES. SO WE WOULD SUBMIT THAT THE COURT
03:41PM 15 NEED NOT ENTERTAIN THIS NONHEARSAY THEORY EITHER NOW OR IF THE
03:41PM 16 ARTICLES ARE OFFERED FOR THAT PURPOSE AT TRIAL.

03:41PM 17 THE SECOND NONHEARSAY PURPOSE THAT THE GOVERNMENT PUTS
03:41PM 18 FORWARD IS THAT, YOU KNOW, THE FACT OF THE COVERAGE IN THE
03:42PM 19 ARTICLES SHOULD BE ADMITTED BECAUSE THE NEWS COVERAGE ITSELF IS
03:42PM 20 A MOTIVE TO DEFRAUD. THE KIND OF CORE PROBLEM WITH THIS THEORY
03:42PM 21 IS THAT IT DOESN'T SPEAK AT ALL TO THE CONTENT OF THE ARTICLES
03:42PM 22 AS OPPOSED TO THE FACT OF THE ARTICLES.

03:42PM 23 AND BECAUSE THE GOVERNMENT APPARENTLY DOES INTEND TO CALL
03:42PM 24 TWO JOURNALISTS AT TRIAL, AND BECAUSE IT DOES INTEND TO ASK
03:42PM 25 INVESTORS AND OTHERS ABOUT PARTICULAR NEWS ARTICLES THAT THEY

03:42PM 1 MAY HAVE ACTUALLY SEEN, THE JURY IS GOING TO BE AWARE THAT
03:42PM 2 THERE IS PRESS COVERAGE OF THERANOS AND BECAUSE OF THAT THERE'S
03:42PM 3 NO NEED TO ADMIT KIND OF THE STACKS OF NEWS ARTICLES FOR THIS
03:42PM 4 PURPOSE TO KIND OF CEMENT SOME IDEA THAT THERE'S A MOTIVE FOR
03:42PM 5 POSITIVE PRESS COVERAGE.

03:42PM 6 THE THIRD NONHEARSAY PURPOSE IS FOR EFFECT ON THE READER.
03:42PM 7 SO THE GOVERNMENT IS ARGUING HERE THAT IT NEEDS TO ADMIT THE
03:42PM 8 NEWS ARTICLE TO SHOW THEIR EFFECT ON INVESTORS, IN OTHER WORDS,
03:42PM 9 LIKE WHY THEY WERE MOTIVATED TO INVEST IN THERANOS.

03:43PM 10 AND THE GOVERNMENT PRESENTS THIS AS A NONHEARSAY PURPOSE,
03:43PM 11 BUT ACTUALLY IT DOESN'T SOLVE THE THRESHOLD HEARSAY ISSUE THAT
03:43PM 12 IS IDENTIFIED IN OUR BRIEF.

03:43PM 13 AND THE REASON FOR THAT, YOUR HONOR, IS BECAUSE TO THE
03:43PM 14 EXTENT THAT THE GOVERNMENT IS OFFERING TESTIMONY FROM INVESTORS
03:43PM 15 ABOUT THE IMPACT AN ARTICLE HAD ON THEIR DESIRE TO INVEST,
03:43PM 16 THEY'RE ACTUALLY JUST OFFERING SUBSTANTIVE EVIDENCE OF THE
03:43PM 17 ALLEGED FRAUD IN THE CASE, AND FOR THAT TO BE RELEVANT IT HAS
03:43PM 18 TO BE MATERIALLY MISLEADING AND ATTRIBUTABLE TO MS. HOLMES.

03:43PM 19 SO IF THAT'S THE CASE, THEN THERE NEEDS TO BE -- IT NEEDS
03:43PM 20 TO BE THE CASE THAT MS. HOLMES IS ACTUALLY RESPONSIBLE FOR THE
03:43PM 21 REPRESENTATIONS THAT ARE CONTAINED IN THE ARTICLE, WHICH IS A
03:43PM 22 FACTUAL ASSERTION IMPLICIT IN THE ARTICLE THAT THE AUTHOR WOULD
03:43PM 23 HAVE TO COME IN AND TESTIFY FOR.

03:43PM 24 SO A GOOD CITATION FOR THAT IS IN OUR BRIEFS, AND IT'S THE
03:43PM 25 ACLU OF NEVADA CASE VERSUS THE CITY OF LOS ANGELES, 13 F.SUPP.

03:44PM 1 2D 1064.

03:44PM 2 AND THAT'S WHEN -- THAT MAKES THE HELPFUL POINT THAT EVEN
03:44PM 3 WHEN THE STATEMENT IN THE ARTICLE ON THE ONE LEVEL IS
03:44PM 4 NONHEARSAY OR OFFERED FOR A NONHEARSAY PURPOSE, IT'S THE
03:44PM 5 REPETITION OF THE STATEMENT IN THE NEWS ARTICLE THAT CAUSES THE
03:44PM 6 HEARSAY PROBLEM.

03:44PM 7 AND THEN FINALLY, THERE'S THE ENDORSEMENT OR CIRCULATION
03:44PM 8 THEORY. WE SUBMIT THIS DOESN'T SOLVE THEIR HEARSAY PROBLEM,
03:44PM 9 EITHER.

03:44PM 10 AS AN INITIAL MATTER, THE GOVERNMENT PROVIDES NO CASE LAW
03:44PM 11 SUPPORTING ADMITTING NEWS ARTICLES AGAINST A CRIMINAL DEFENDANT
03:44PM 12 UNDER THIS THEORY. I MEAN, REALLY NONE OF ITS CASES SPEAK TO
03:44PM 13 THAT, YOUR HONOR.

03:44PM 14 THE CASES THEY DO CITE, CICCONE, AND I DON'T KNOW IF I AM
03:44PM 15 PRONOUNCING THAT CORRECTLY, BUT IT'S C-I-C-C-O-N-E, AND THAT'S
03:44PM 16 AT 219 F.3D 1078. AND THAT'S OBVIOUSLY NOT ON POINT AS WE
03:45PM 17 EXPLAINED IN OUR BRIEF.

03:45PM 18 SO THE GOVERNMENT HASN'T REALLY LAID THE CONTOURS OF THIS
03:45PM 19 KIND OF RATIFICATION OR ENDORSEMENT THEORY OUT, AND PERHAPS
03:45PM 20 IT'S BETTER LEFT TO SETTLE AT TRIAL IN CASE THERE ARE ANY
03:45PM 21 ARTICLES IN FACT OFFERED UNDER THIS THEORY.

03:45PM 22 BECAUSE EVEN IF YOU WERE TO ACCEPT THAT THIS THEORY IS
03:45PM 23 ACTUALLY TRULY GETTING OUT FROM UNDER THAT THRESHOLD HEARSAY
03:45PM 24 PROBLEM, IT REALLY COULD ONLY DO SO UNDER CERTAIN CIRCUMSTANCES
03:45PM 25 AND PROBABLY ONLY FOR A SMALL NUMBER OF ARTICLES, AND EVEN THEN

03:45PM 1 IT PROBABLY WOULDN'T JUSTIFY ADMITTING THE ENTIRETY OF THE
03:45PM 2 ARTICLES THEMSELVES.

03:45PM 3 SO I THINK A FRAMEWORK FOR THIS THEORY TO WORK, THE
03:45PM 4 GOVERNMENT WOULD PROBABLY HAVE TO SHOW THAT THE ARTICLE WAS
03:45PM 5 LIKE ACTUALLY SHARED WITH AN INVESTOR. THE GOVERNMENT GIVES AN
03:45PM 6 EXAMPLE OF ONE IN ITS BRIEF, BUT IT HAS NOT KIND OF LAID OUT
03:46PM 7 EXACTLY WHICH SUBSET OF ARTICLES IT'S PROPOSING TO OFFER FOR
03:46PM 8 THIS PURPOSE.

03:46PM 9 AND THEN I THINK THEY WOULD HAVE TO SHOW THAT MS. HOLMES
03:46PM 10 ACTUALLY DID SHARE THE ARTICLE OR THAT SHE WAS RESPONSIBLE FOR
03:46PM 11 THE SHARING; AND I THINK THAT THEY WOULD HAVE TO SHOW THAT THE
03:46PM 12 ARTICLE CONTAINS AN ALLEGED MISREPRESENTATION; AND THAT
03:46PM 13 MS. HOLMES WAS AWARE THAT THERE WAS AN ALLEGED
03:46PM 14 MISREPRESENTATION IN THE ARTICLE FOR THIS TO BE A RELEVANT
03:46PM 15 BASIS FOR ADMISSION.

03:46PM 16 I THINK IT'S IMPORTANT FOR THE GOVERNMENT TO HAVE TO MAKE
03:46PM 17 THESE FOUNDATIONAL SHOWING IF IT INDEED IS OFFERING ARTICLES
03:46PM 18 UNDER THIS THEORY BECAUSE THEIR BRIEF TELEGRAPHS PERHAPS A MORE
03:46PM 19 EXPANSIVE VERSION OF THIS THEORY WHERE ANY ARTICLE THAT IS
03:46PM 20 EITHER BEING CIRCULATED IN THE NEWS ECOSYSTEM ABOUT THERANOS,
03:46PM 21 WHETHER IT'S BEING TWEETED BY THE THERANOS ACCOUNT, OR WHETHER
03:46PM 22 IT'S BEING SHARED BY OTHER THERANOS EMPLOYEES THAT MS. HOLMES
03:46PM 23 IS RESPONSIBLE FOR THE CONTENT OF THOSE ARTICLES AND FOR KIND
03:46PM 24 OF REVIEWING THEM AND ISSUING CORRECTIONS, AND IF THE
03:47PM 25 GOVERNMENT IS MAKING THAT KIND OF EXPANSIVE THEORY, I THINK

03:47PM 1 IT'S IMPORTANT TO NOTE AND KEEP IN MIND THAT'S GENERALLY NOT
03:47PM 2 THE RESPONSIBILITY OF THE CEO'S, AND IT'S NOT HOW THE CRIME OF
03:47PM 3 WIRE FRAUD HAS BEEN UNDERSTOOD TO WORK IN THE CASES.

03:47PM 4 SECOND, THE REQUIREMENT OF KNOWLEDGE AND ANY MISSTATEMENTS
03:47PM 5 IN AN ARTICLE WOULD KEEP THIS FROM TURNING INTO LIKE A
03:47PM 6 NEGLIGENCE THEORY OF ADMISSIBILITY FOR THESE ARTICLES. DID YOU
03:47PM 7 READ THE ARTICLE CLOSELY ENOUGH SUCH THAT YOU, YOU KNOW, YOU
03:47PM 8 WOULD UNDERSTAND THAT SOMEBODY MIGHT READ IT THIS WAY?

03:47PM 9 SO I THINK THAT THIS THEORY, IF THE GOVERNMENT DOES END UP
03:47PM 10 OFFERING ARTICLES PURSUANT TO IT AT TRIAL, YOU KNOW, POSES A
03:47PM 11 COUPLE TRICKY ISSUES, AND WE WOULD BE PREPARED TO DEAL WITH
03:47PM 12 THOSE AT TRIAL.

03:47PM 13 THE COURT: OKAY.

03:47PM 14 MR. LOOBY: BEFORE I MOVE ON, I JUST WANT TO TOUCH
03:47PM 15 QUICKLY ON SOME OF THE RULE 403 ISSUES THAT THESE ARTICLES
03:47PM 16 POSE, AND INSTEAD OF JUST TALKING GENERALLY ABOUT THE 403
03:48PM 17 STANDARD, WHICH WE'VE BEEN OVER QUITE A BIT OVER THESE PAST
03:48PM 18 THREE DAYS, WE PROVIDED A COUPLE EXAMPLE ARTICLES TO OUR
03:48PM 19 MOTION, AND THAT'S AT DEFENSE EXHIBIT 48, ECF 586-2.

03:48PM 20 AND I THINK THE PREJUDICE THAT THESE ARTICLES POSE, THE
03:48PM 21 UNFAIR PREJUDICE POSE IS KIND OF SELF-EVIDENT, BUT RATHER THAN
03:48PM 22 HAVE YOUR HONOR AND HIS CLERKS KIND OF COMB THROUGH SOME OLD
03:48PM 23 ARTICLES ABOUT THERANOS, I JUST CALL YOUR ATTENTION TO A FEW.

03:48PM 24 THERE'S "THE WALL STREET JOURNAL" ARTICLE AT ECF PAGES 1
03:48PM 25 THROUGH 12 TITLED "CREATING GROWTH, WALGREENS DISMISSED ITS

03:48PM 1 DOUBTS ABOUT THERANOS."

03:48PM 2 THE COURT: COULD YOU CITE THAT AGAIN. IT'S AT?

03:48PM 3 MR. LOOBY: IT'S AT ECF PAGES 1 THROUGH 12, SO IT'S

03:48PM 4 ECF 586-2.

03:49PM 5 THE COURT: OKAY. THANK YOU.

03:49PM 6 MR. LOOBY: SO THIS IS THE FIRST ARTICLE IN OUR

03:49PM 7 COMPENDIUM OF EXEMPLAR ARTICLES FROM THE GOVERNMENT'S EXHIBIT

03:49PM 8 LIST.

03:49PM 9 SO THIS ASSERTS AS FACT THAT THERANOS HAD ACCURACY

03:49PM 10 PROBLEMS WITH ITS TESTS. IT CONTAINS ANONYMOUS QUOTES FROM

03:49PM 11 WALGREENS EXECUTIVES SAYING THAT THEY WERE, UNNAMED WALGREENS

03:49PM 12 EXECUTIVES SAYING THAT THEY WERE AFRAID OF GETTING SUED BY

03:49PM 13 THERANOS.

03:49PM 14 IT TALKS ABOUT A CIVIL FRAUD CASE THAT WAS RECENTLY, AT

03:49PM 15 THE TIME IT RECENTLY HAD BEEN FILED BY A THERANOS PATIENT.

03:49PM 16 SO -- I WON'T TICK THROUGH THEM ALL, BUT THERE'S ALSO "A

03:49PM 17 NEW YORKER" ARTICLE, AND THIS IS BY A JOURNALIST NAMED

03:49PM 18 KEN AULETTA AND THE TITLE IS "BLOOD SIMPLER." AND THIS IS A

03:49PM 19 2014 ARTICLE, AND THIS IS AT ECF PAGES 32 THROUGH 49.

03:49PM 20 I DRAWER YOUR ATTENTION TO THIS BECAUSE THE GOVERNMENT IN

03:49PM 21 ITS OPPOSITION KIND OF TRIES TO DRAW A DISTINCTION BETWEEN

03:49PM 22 NEGATIVE NEWS OF THERANOS AND WHAT IT CHARACTERIZES AS POSITIVE

03:50PM 23 NEWS COVERAGE THAT WOULD PREDATE THE MOMENT IN TIME WHEN THE

03:50PM 24 GOVERNMENT WOULD SAY THAT THE FRAUD WAS EXPOSED, QUOTE-UNQUOTE.

03:50PM 25 BUT THIS ARTICLE PREDATES THAT MOMENT IN TIME ON THE

03:50PM 1 GOVERNMENT'S TIMELINE.

03:50PM 2 BUT IT SAYS, QUOTE, "SOME OBSERVERS ARE TROUBLED BY
03:50PM 3 THERANOS'S SECRECY."

03:50PM 4 IT CONTAINS COMMENTARY FROM THE JOURNALISTS ABOUT HOW
03:50PM 5 MS. HOLMES PRESENTS BOTH IN HER PHYSICAL PRESENTATION AND HOW
03:50PM 6 SHE PRESENTS WHEN TALKING TO ROOMS FULL OF PEOPLE.

03:50PM 7 THOSE ARE HIS OWN SUBJECTIVE OPINIONS ABOUT HOW SHE
03:50PM 8 PRESENTS.

03:50PM 9 THERE ARE QUOTES FROM QUEST DIAGNOSTICS EXECUTIVES TAKING
03:50PM 10 ISSUE WITH SEVERAL OF THERANOS'S CLAIMS ABOUT ITS TECHNOLOGY
03:50PM 11 AND SAYING BROADLY THAT FINGERSTICK BLOOD TESTS AREN'T RELIABLE
03:51PM 12 FOR CLINICAL DIAGNOSTIC TESTS.

03:51PM 13 SO I THINK, YOUR HONOR, WHERE THIS LEAVES US IS THAT THE
03:51PM 14 GOVERNMENT HAS POSITED A SERIES OF KIND OF ROUGHLY SKETCHED OUT
03:51PM 15 NONHEARSAY PURPOSES TO MOVE IN A POTENTIALLY MASSIVE AMOUNT OF
03:51PM 16 UNFAIRLY PREJUDICIAL INFORMATION, AND THESE JOURNALISTS WOULD
03:51PM 17 NOT BE ON THE STAND FOR CROSS-EXAMINATION BECAUSE THE
03:51PM 18 GOVERNMENT DOES NOT INTEND TO CALL THEM.

03:51PM 19 THEIR SOURCES, MANY OF THEM ARE ANONYMOUS. THESE SOUND
03:51PM 20 BITES WOULD BE PUT BEFORE THE JURY WITHOUT MS. HOLMES'S ABILITY
03:51PM 21 TO CROSS-EXAMINE THE SOURCES.

03:51PM 22 SOME OF THE PEOPLE WHO THE QUOTES ARE ATTRIBUTED TO,
03:51PM 23 EITHER ANONYMOUSLY OR ATTRIBUTED TO BY NAME, ARE GOING TO BE
03:51PM 24 TRIAL WITNESSES IN THE CASE, AND A LOT OF THE CONTENT OF THE
03:51PM 25 ARTICLES DISCUSS ISSUES THAT OVERLAP WITH THE GOVERNMENT'S

03:51PM 1 ALLEGATIONS, AND THAT WILL BE AT ISSUE IN THE CASE.

03:51PM 2 SO THESE ARTICLES KIND OF REALLY HAVE NO PLACE IN THE
03:51PM 3 EVIDENCE IN THIS CASE, AND SO WE SUBMIT THAT THE COURT SHOULD
03:51PM 4 EXCLUDE THEM.

03:51PM 5 THE COURT: ALL RIGHT. THANK YOU.

03:52PM 6 MR. BOSTIC.

03:52PM 7 MR. BOSTIC: YES. YOUR HONOR, GOOD AFTERNOON AGAIN.

03:52PM 8 I THINK IT'S IMPORTANT TO START WITH THE RELIEF SOUGHT BY
03:52PM 9 THE DEFENSE'S MOTION. AND THIS IS THE DEFENSE'S MOTION BY THE
03:52PM 10 WAY. I THINK THE DEFENSE MAKES STRATEGIC USE OF RAISING THE
03:52PM 11 SPECTER OF THE GOVERNMENT INTRODUCING A STACK OF NEWSPAPER
03:52PM 12 ARTICLES AS AN EXHIBIT IN THIS CASE, HANDING THEM TO THE JURY
03:52PM 13 AND SAYING "HAVE AT IT, YOU CAN RELY ON THESE ARTICLES FOR THE
03:52PM 14 TRUTH OF THE STATEMENTS THEREIN."

03:52PM 15 THAT'S NOT AT ALL THE GOVERNMENT'S PLAN. THERE'S NO
03:52PM 16 REASON TO BELIEVE THAT THAT'S THE GOVERNMENT'S PLAN, BUT LET ME
03:52PM 17 JUST SAY IT SO THAT IT'S SAID.

03:52PM 18 THIS IS NOT BEFORE THE COURT ON THE GOVERNMENT'S MOTION TO
03:52PM 19 ADMIT ALL 50 OF THE NEWS ARTICLES. THIS IS THE DEFENSE ASKING
03:52PM 20 THE COURT FOR ONE BLANKET ORDER THAT WOULD EXCLUDE ALL OF THOSE
03:52PM 21 MATERIALS FROM CONSIDERATION BY THE JURY IN THIS CASE.

03:52PM 22 THE GOVERNMENT'S MAIN POINT IN RESPONSE IS THAT THE
03:53PM 23 DEFENSE PAINTS WITH TOO FAR BROAD -- FAR TOO BROAD A BRUSH IN
03:53PM 24 MAKING THAT REQUEST FOR RELIEF.

03:53PM 25 THESE ARTICLES REALLY NEED TO BE VIEWED ON A CASE-BY-CASE

03:53PM 1 BASIS. AND THE GOVERNMENT HAS PROFFERED TO THE COURT THEORIES
03:53PM 2 OF ADMISSIBILITY FOR THESE ARTICLES TO SHOW, TO DEMONSTRATE WHY
03:53PM 3 A BLANKET ORDER IS INAPPROPRIATE FOR THESE CASES.

03:53PM 4 THE AUTHORITY CITED BY THE DEFENSE IS QUITE NARROW IN ITS
03:53PM 5 HOLDING AND THE DEFENSE POINTS OUT THAT THE GOVERNMENT DOESN'T
03:53PM 6 HAVE CASE AUTHORITY SUPPORTING ITS SPECIFIC THEORIES OF
03:53PM 7 ADMISSIBILITY BUT NOR DOES THE DEFENSE HAVE CASES SUPPORTING
03:53PM 8 ITS ARGUMENT THAT THESE MATERIALS CANNOT COME IN FOR THESE
03:53PM 9 NONHEARSAY PURPOSES.

03:53PM 10 THE DEFENSE CASES ARE EASILY DISTINGUISHABLE. THE LAREZ
03:53PM 11 CASE AND ACLU VERSUS LAS VEGAS ARE BOTH ABOUT OFFERING NEWS
03:53PM 12 ARTICLES FOR THE TRUTH AND THE ACCURACY OF STATEMENTS THAT WERE
03:53PM 13 MADE IN THOSE ARTICLES.

03:53PM 14 SO SOMEONE RELEVANT TO THE LITIGATION MADE A STATEMENT AND
03:54PM 15 WAS QUOTED IN THE ARTICLE, AND A PARTY SOUGHT TO INTRODUCE THE
03:54PM 16 ARTICLE NOT TO PROVE THAT THE ARTICLE EXISTED, NOT TO SHOW THE
03:54PM 17 EFFECT ON THE READER, BUT AS SUBSTANTIVE PROOF THAT THAT ACTUAL
03:54PM 18 STATEMENT WAS MADE. THAT'S NOT HOW THE GOVERNMENT IS SEEKING
03:54PM 19 TO USE THE ARTICLES IN THIS CASE.

03:54PM 20 WHEN NECESSARY, IF THE GOVERNMENT NEEDS TO SHOW THAT THE
03:54PM 21 DEFENDANT ACTUALLY DID MAKE A STATEMENT QUOTED IN AN ARTICLE,
03:54PM 22 IT WILL DO SO VIA AN APPROPRIATE NONHEARSAY MECHANISM, EITHER
03:54PM 23 TESTIMONY BY THE PERSON WHO HEARD THAT STATEMENT FROM
03:54PM 24 MS. HOLMES AND IN SOME CASES THERE ARE RECORDINGS OF
03:54PM 25 DEFENDANT'S CONVERSATIONS WITH JOURNALISTS.

03:54PM 1 THESE ARE THE WAYS THAT A JURY WILL BE ABLE TO CONCLUDE
03:54PM 2 THAT STATEMENTS IN THE ARTICLES ARE ACTUALLY ACCURATE AND THAT
03:54PM 3 THE DEFENDANT ACTUALLY MADE THEM, OTHERWISE THE ARTICLES ARE
03:54PM 4 COMING IN FOR DIFFERENT AND PERMISSIBLE PURPOSES.

03:54PM 5 REMOVING NEWS ARTICLES FROM THE TRIAL HERE WOULD HIDE FROM
03:54PM 6 THE JURY AN IMPORTANT TOOL THAT THIS DEFENDANT USED TO
03:55PM 7 ACCOMPLISH THE FRAUD IN THIS CASE, AND THAT'S WHY THIS IS AN
03:55PM 8 IMPORTANT MOTION, AND THAT'S WHY IT'S IMPORTANT THAT THE COURT
03:55PM 9 NOT PAINT WITH TOO BROAD A BRUSH THE WAY THAT THE DEFENSE IS.

03:55PM 10 THE IMPORTANT CATEGORY OF FACTS THAT WE'RE TALKING ABOUT
03:55PM 11 HERE IS NOT, AGAIN, THE FACTS RECORDED IN THE ARTICLES. THE
03:55PM 12 GOVERNMENT DOES NOT NEED TO PROVE ITS CASE BY NEWS ARTICLES IN
03:55PM 13 THIS CASE.

03:55PM 14 INSTEAD, THE ESSENTIAL FACTS INVOLVE HOW THE CONTENT OF
03:55PM 15 THOSE ARTICLES REFLECTED OVERALL PUBLIC OPINION ABOUT THERANOS,
03:55PM 16 WHICH IS RELEVANT IN THIS CASE, AND IN TURN SHAPED READER'S
03:55PM 17 VIEWS OF THE COMPANY AND THEIR UNDERSTANDING OF THE COMPANY'S
03:55PM 18 POTENTIAL. NONE OF THIS IMPLICATES THE HEARSAY PROBLEMS RAISED
03:55PM 19 BY THE DEFENSE.

03:55PM 20 I'D LIKE TO GO THROUGH THE THREE PERMISSIBLE USES OF THESE
03:55PM 21 ARTICLES IF I MIGHT.

03:55PM 22 FIRST, AS TO SHOW -- AS TO THE USE OF SHOWING FAVORABLE
03:55PM 23 PRESS COVERAGE OF THERANOS. THIS IS AN IMPORTANT PART OF THE
03:56PM 24 STORY HERE. THE NEWS COVERAGE SERVES AS A USEFUL BAROMETER OF
03:56PM 25 PUBLIC OPINION WHEN IT CAME TO THERANOS. IT'S NOT IMPORTANT

03:56PM 1 THAT THE JURY RELY ON THE TRUTH OF THE STATEMENTS IN THE
03:56PM 2 ARTICLES FOR THEM TO SERVE THAT PURPOSE. INSTEAD, THE JURY
03:56PM 3 SHOULD BE ALLOWED TO LOOK AT ARTICLES GENERALLY AND UNDERSTAND
03:56PM 4 THAT DURING THIS PERIOD OF TIME THERE WAS A LOT OF EXCITEMENT
03:56PM 5 ABOUT THE COMPANY, THAT THERE WAS FAVORABLE PRESS COVERAGE,
03:56PM 6 THAT THERE WAS WIDESPREAD PRESS COVERAGE, AND THAT'S IMPORTANT
03:56PM 7 FOR A COUPLE OF REASONS.

03:56PM 8 FIRST, IT'S PART OF THE MODE OF EVIDENCE IN THIS CASE, AND
03:56PM 9 I KNOW THE DEFENSE TOUCHED ON THIS, BUT JUST BRIEFLY. THIS WAS
03:56PM 10 NOT JUST THE EXISTENCE OF PRESS COVERAGE, BUT QUITE FAVORABLE
03:56PM 11 PRESS COVERAGE WITH THE DEFENDANT HERSELF BEING FEATURED ON A
03:56PM 12 VARIETY OF MAGAZINE COVERS, RECEIVING ADULATION FROM THE PRESS,
03:56PM 13 AGAIN, A LOT OF HYPE AND EXCITEMENT BUILDING UP AROUND THIS
03:56PM 14 COMPANY, ITS POTENTIAL, THAT WAS THE BENEFIT THAT THE DEFENDANT
03:57PM 15 OBTAINED BY VIRTUE OF THE FRAUD.

03:57PM 16 THE COURT: IS THAT A PERSONAL BENEFIT OR A COMPANY
03:57PM 17 BENEFIT OR CAN YOU DISTINGUISH THOSE TWO?

03:57PM 18 MR. BOSTIC: SO IT'S CERTAINLY BOTH, YOUR HONOR.
03:57PM 19 ARGUABLY, IT IS A BENEFIT TO THE COMPANY, BUT IT'S ABSOLUTELY A
03:57PM 20 PERSONAL BENEFIT AS WELL.

03:57PM 21 AND PEOPLE CAN DIFFER ON WHETHER THEY THINK THAT CELEBRITY
03:57PM 22 IS A BLESSING OR A CURSE. BUT PEOPLE CERTAINLY SEEK IT OUT,
03:57PM 23 YOUR HONOR, AND THE JURY IS ENTITLED TO CONCLUDE THAT THE
03:57PM 24 DEFENDANT'S DESIRE TO BE FAMOUS, TO RECEIVE THIS PRAISE, THIS
03:57PM 25 ATTENTION WAS PART OF HER MOTIVE FOR ENGAGING IN THIS SCHEME TO

03:57PM 1 DEFRAUD.

03:57PM 2 AND THE EVIDENCE SHOWS THAT THE DEFENDANT WAS VERY AWARE
03:57PM 3 OF THE PRESS COVERAGE. THE EVIDENCE WILL SHOW AT TRIAL THAT
03:57PM 4 THE DEFENDANT CLOSELY MONITORED PRESS CONCERNING HER AND THE
03:57PM 5 COMPANY, AND THAT WILL SUPPORT THE JURY'S INFERENCE THAT THIS
03:57PM 6 WAS PART OF THE MOTIVE IN THIS CASE.

03:57PM 7 SO, AGAIN, THIS ISN'T ABOUT ASKING THE JURY TO ASSUME THE
03:58PM 8 TRUTH OF ANY STATEMENTS IN THESE ARTICLES, BUT IT'S ALSO ABOUT
03:58PM 9 MORE THAN JUST THE EXISTENCE OF THE ARTICLES. THE JURY NEEDS
03:58PM 10 TO UNDERSTAND THAT THIS WAS FAVORABLE COVERAGE THAT BENEFITTED
03:58PM 11 THE DEFENDANT.

03:58PM 12 THE COURT: SO WHAT IS THE GOVERNMENT'S PLAN IN THAT
03:58PM 13 REGARD? HOW MUCH DO YOU NEED TO PUT THIS ON?

03:58PM 14 AND PERHAPS THE DEFENSE WOULD STIPULATE, YES, THAT WE'LL
03:58PM 15 STIPULATE THAT THIS STARTUP WAS WELL PUBLICIZED FOR MANY YEARS.
03:58PM 16 IT WAS IN THE MEDIA, IT WAS IN THE MEDIA'S ATTENTION, AND IT
03:58PM 17 WAS IN THE PUBLIC EYE.

03:58PM 18 MR. BOSTIC: SO, YOUR HONOR, SOMETIMES A PARTY IN
03:58PM 19 LITIGATION WILL AGREE TO STIPULATE TO SOMETHING BECAUSE THE
03:58PM 20 IMPACT OF THE EVIDENCE WILL ACTUALLY BE MORE UNFAVORABLE TO
03:58PM 21 THEIR CASE. I SUSPECT THAT IF THEY WERE WILLING TO STIPULATE
03:58PM 22 TO THAT, THAT MIGHT BE THE REASON.

03:58PM 23 I THINK IT'S IMPORTANT FOR THE JURY TO SEE THE EXTENT OF
03:58PM 24 THIS COVERAGE. I DON'T THINK IT REQUIRES A LARGE VOLUME OF
03:58PM 25 EVIDENCE. I THINK A SAMPLING OF MAGAZINE COVERS AND SOME

03:58PM 1 SAMPLE LANGUAGE FROM THOSE ARTICLES SHOWING THAT THIS WAS
03:59PM 2 POSITIVE COVERAGE OVER THE RELEVANT PERIOD OF TIME WOULD BE
03:59PM 3 SUFFICIENT.

03:59PM 4 SO, AGAIN, I DON'T THINK WE'RE TALKING ABOUT A LARGE
03:59PM 5 VOLUME OF EVIDENCE, NOR IS THIS THE MOST IMPORTANT USE OF THESE
03:59PM 6 ARTICLES.

03:59PM 7 THE SECOND CATEGORY OF PERMISSIBLE USE GETS INTO SOMETHING
03:59PM 8 A LITTLE MORE IMPORTANT, AND, THAT IS, TO SHOW THE EFFECT ON
03:59PM 9 WITNESSES WHO READ THE ARTICLE AND HOW IT INFORMED THEIR
03:59PM 10 DECISIONMAKING.

03:59PM 11 SO THE EVIDENCE AT TRIAL WILL SHOW THAT THE CONTENT OF
03:59PM 12 NEWS ARTICLES INFLUENCED THE DECISIONMAKING OF WITNESSES IN
03:59PM 13 THIS CASE, AND THAT'S TRUE AS TO INVESTORS IN PARTICULAR.

03:59PM 14 THE COURT: SO IF THERE WERE ARTICLES THAT WERE PUT
03:59PM 15 IN BINDERS, MARKETING BINDERS, PROSPECTUS, AND A POTENTIAL
03:59PM 16 INVESTOR HAD BENEFIT OF THAT, THAT'S A DIFFERENT STORY THAN
03:59PM 17 JUST A STANDALONE ARTICLE I GUESS.

03:59PM 18 MR. BOSTIC: CORRECT. AND THAT, YOUR HONOR, WE'LL
03:59PM 19 GET INTO THE THIRD CATEGORY WHERE THE THEORY AND THE ALLEGATION
03:59PM 20 IS THAT THE DEFENDANT ACTIVELY USED THESE ARTICLES AS A VEHICLE
03:59PM 21 TO PRESENT MISREPRESENTATIONS TO THE VICTIMS IN THIS CASE. SO
03:59PM 22 THAT'S CATEGORY THREE.

04:00PM 23 CATEGORY TWO, THOUGH, EVEN AS TO ARTICLES THAT WEREN'T
04:00PM 24 SENT BY DEFENDANT TO POTENTIAL INVESTORS, DEFENDANT CERTAINLY
04:00PM 25 KNEW THAT THESE ARTICLES WERE OUT THERE, GENERALLY SPEAKING,

04:00PM 1 AND THEY'RE ADMISSIBLE FOR THE EFFECT THAT THEY HAD ON
04:00PM 2 INVESTORS WHO WERE DECIDING WHETHER TO PART WITH THEIR MONEY
04:00PM 3 AND PURCHASE SHARES IN THERANOS.

04:00PM 4 THE COURT: BUT ISN'T THAT CATEGORY THREE?

04:00PM 5 MR. BOSTIC: SO CATEGORY THREE WOULD INVOLVE AN
04:00PM 6 ACTIVE USE BY THE DEFENDANT WHERE THE DEFENDANT ACTUALLY HAD A
04:00PM 7 ROLE EITHER IN RATIFYING THE CONTENT OF THE ARTICLE OR
04:00PM 8 SPECIFICALLY DIRECTING THAT ARTICLE TOWARDS AN INDIVIDUAL
04:00PM 9 DEFENDANT OR, EXCUSE ME, AN INDIVIDUAL VICTIM OR AT LEAST
04:00PM 10 PUBLICIZING IT ON THE THERANOS WEBSITE.

04:00PM 11 THE COURT: AND DOESN'T CATEGORY TWO, ISN'T THAT
04:00PM 12 SOMETHING THAT IS NOT WITHIN HER CONTROL? THAT'S MEDIA
04:00PM 13 ATTENTION, AND THAT'S POLLING, AND THAT'S REALLY UP TO THE
04:00PM 14 WHIMS OF THE EDITORS AND EVERYBODY IS A JOURNALIST THESE DAYS
04:01PM 15 I'M TOLD.

04:01PM 16 SO IS THAT FAIR TO HOLD HER TO BE SOMEWHAT RESPONSIBLE
04:01PM 17 UNLESS YOUR THEORY IS SHE PURSUED THAT ATTENTION, SHE PURSUED
04:01PM 18 THAT CELEBRITY, AND MADE HERSELF AVAILABLE FOR X MAGAZINES.

04:01PM 19 MR. BOSTIC: THAT'S CERTAINLY TRUE, YOUR HONOR, AND
04:01PM 20 THE JURY WOULD BE REASONABLE TO INFER THAT. BUT THIS CATEGORY
04:01PM 21 IS LESS ABOUT ATTRIBUTING STATEMENTS TO DEFENDANT, LESS ABOUT
04:01PM 22 BLAMING HER FOR THE CONTENT OF THE ARTICLES, AND MORE ABOUT
04:01PM 23 SIMPLY RECOGNIZING HOW THESE ARTICLES AFFECTED INVESTORS
04:01PM 24 THOUGHT PROCESSES, FOR EXAMPLE. AND THE WAY THAT HAPPENED IS
04:01PM 25 THE ARTICLES MADE IT A LOT EASIER FOR THESE VICTIMS TO BE

04:01PM 1 DEFRAUDED, TO PUT IT BLUNTLY.

04:01PM 2 THE EXISTENCE OF ALL OF THIS HYPE AND EXCITEMENT AND
04:01PM 3 FAVORABLE COVERAGE ABOUT THERANOS CREATED A SENSE OF URGENCY IN
04:01PM 4 INVESTORS, THEY DIDN'T WANT TO MISS OUT ON WHAT WAS GOING TO
04:02PM 5 BE, ACCORDING TO THE COVERAGE, A LUCRATIVE INVESTMENT
04:02PM 6 OPPORTUNITY. THE ARTICLES PRESENTED A LOT OF FAVORABLE
04:02PM 7 INFORMATION ABOUT THERANOS AND WHAT ITS TECHNOLOGY COULD DO.

04:02PM 8 THE GOVERNMENT IS ENTITLED TO ARGUE THAT DEFENDANT
04:02PM 9 EXPLOITED THAT FAVORABLE COVERAGE AND THEN IT PAVED THE WAY FOR
04:02PM 10 THE FRAUD THAT SHE ENDED UP COMMITTING.

04:02PM 11 SO AGAIN, THIS IS NOT ABOUT CONVICTING THE DEFENDANT FOR
04:02PM 12 THE CONTENT OF THOSE PARTICULAR ARTICLES.

04:02PM 13 THE EVIDENCE WILL SHOW THAT THE DEFENDANT REPEATED THE
04:02PM 14 LIES IN THESE ARTICLES AND REPEATED THOSE FALSE STATEMENTS TO
04:02PM 15 THE INDIVIDUAL VICTIMS OR CAUSED THOSE FALSE STATEMENTS TO GO
04:02PM 16 TO THE VICTIMS.

04:02PM 17 BUT THE ARTICLES THEMSELVES PRIMED THE VICTIMS TO BE
04:02PM 18 RECEPTIVE TO THAT DECEPTION, AND THAT IS AN IMPORTANT ELEMENT
04:02PM 19 OF THE STORY THAT THE JURY SHOULD NOT MISS OUT ON.

04:02PM 20 I'LL JUST POINT OUT ALTHOUGH NEITHER SIDE CITES A CASE
04:02PM 21 INVOLVING THIS PARTICULAR FACT PATTERN, OF COURSE, THAT
04:02PM 22 NONHEARSAY USE, THE USE OF NEWS ARTICLES TO SHOW THE EFFECT ON
04:03PM 23 THE READER IS WELL ESTABLISHED, AND THERE'S NO REASON TO
04:03PM 24 DEVIATE FROM THAT STANDARD RULE IN THIS CASE.

04:03PM 25 FINALLY, THE THIRD CATEGORY, THE THIRD PERMITTED USE.

04:03PM 1 THIS IS IMPORTANT BECAUSE ARTICLES ADMITTED UNDER THIS THEORY
04:03PM 2 WILL DEMONSTRATE HOW THE DEFENDANT DIDN'T JUST BENEFIT FROM THE
04:03PM 3 EXISTENCE OF THESE ARTICLES, BUT ACTIVELY COURTED ATTENTION
04:03PM 4 FROM THE PRESS AND SPECIFICALLY INJECTED THESE FALSE STATEMENTS
04:03PM 5 INTO THE NEWS MEDIA.

04:03PM 6 SO HERE THERE WILL BE INSTANCES, OF COURSE, WHERE THE
04:03PM 7 GOVERNMENT WILL USE TESTIMONY FROM JOURNALISTS OR RECORDINGS OF
04:03PM 8 INTERVIEWS TO SHOW THAT, YES, THE DEFENDANT DID MAKE A
04:03PM 9 PARTICULAR STATEMENT.

04:03PM 10 BUT AN ARTICLE SHOULD ALSO BE ADMISSIBLE IF THE EVIDENCE
04:03PM 11 SHOWS THAT THE DEFENDANT WAS INTERVIEWED BY A JOURNALIST, SAW A
04:03PM 12 COPY OF THE ARTICLE BEFORE IT WAS PUBLISHED, INCLUDING SPECIFIC
04:03PM 13 STATEMENTS, HAD THE CHANCE TO CORRECT ANYTHING AND DIDN'T, AND
04:03PM 14 LET THOSE FALSE STATEMENTS END UP IN THE ARTICLE.

04:04PM 15 THE ACT OF DECLINING TO TAKE THE OPPORTUNITY TO CORRECT
04:04PM 16 SOMETHING, THE ACT OF APPROVING THAT ARTICLE BEFORE IT WAS
04:04PM 17 PUBLISHED SHOULD COUNT HERE. IT'S NOT THE SAME THING AS ASKING
04:04PM 18 THE JURY TO BELIEVE THE STATEMENTS IN THE ARTICLE WITHOUT ANY
04:04PM 19 EVIDENCE OF THE DEFENDANT'S STATEMENTS OR RATIFICATION.

04:04PM 20 SIMILARLY, THE JURY SHOULD BE ABLE TO HEAR ABOUT AT LEAST
04:04PM 21 ONE INSTANCE WHERE THE DEFENDANT WAS CONFRONTED WITH FALSE
04:04PM 22 STATEMENTS IN A NEWS ARTICLE FOLLOWING HER INTERVIEW AND
04:04PM 23 DECIDED NOT TO DO ANYTHING ABOUT IT.

04:04PM 24 HERE AGAIN IT'S THE FACT OF THAT CONFRONTATION, IT'S THE
04:04PM 25 DEFENDANT'S DECISION NOT TO DO ANYTHING TO CORRECT THE FALSE

04:04PM 1 STATEMENT IN THAT ARTICLE THAT IS THE RELEVANT FACT FOR THE
04:04PM 2 JURY. AND THIS IS A CASE OUTLINED OR A SITUATION OUTLINED IN
04:04PM 3 THE GOVERNMENT'S BRIEFING WHERE AN IN-HOUSE THERANOS ATTORNEY
04:05PM 4 ACTUALLY BROUGHT TO THE DEFENDANT'S ATTENTION FALSE OR
04:05PM 5 MISLEADING STATEMENTS IN AN ARTICLE THAT RESULTED FROM HER
04:05PM 6 INTERVIEWS, AND SHE DID NOTHING TO REACH OUT TO THE JOURNALIST
04:05PM 7 OR CORRECT THAT FALSE INFORMATION.

04:05PM 8 WHY SHOULD THE JURY BE PRECLUDED FROM HEARING ABOUT THAT?
04:05PM 9 FINALLY, THE DEFENDANT SHOULD BE RESPONSIBLE FOR ARTICLES
04:05PM 10 THAT SHE CAUSED TO BE SENT TO INDIVIDUALS, WHETHER THOSE ARE
04:05PM 11 POTENTIAL INVESTORS, AND, THEREFORE, POTENTIAL VICTIMS IN THE
04:05PM 12 CASE OR THE PUBLIC AT LARGE.

04:05PM 13 THE EVIDENCE WILL SHOW THAT, AGAIN, THE DEFENDANT WAS VERY
04:05PM 14 INVOLVED IN MONITORING PRESS COVERAGE OF THERANOS AND HERSELF
04:05PM 15 AND VERY ACTIVE IN DECIDING WHAT ROLES, OR EXCUSE ME, IN
04:05PM 16 DECIDING WHAT ARTICLES WOULD BE SENT TO INVESTORS OR PUBLISHED
04:05PM 17 ON THERANOS'S WEBSITE OR ON SOCIAL MEDIA.

04:05PM 18 BY SENDING OUT THAT INFORMATION, THE DEFENDANT WAS
04:05PM 19 INVITING POTENTIAL VICTIMS TO RELY ON THAT INFORMATION AND
04:06PM 20 ADOPTING THE STATEMENTS THEREIN.

04:06PM 21 IT CANNOT BE THE CASE THAT A FRAUDSTER CAN HIDE BEHIND THE
04:06PM 22 SOURCE OF INFORMATION WHEN IT'S THE FRAUDSTER HERSELF WHO IS
04:06PM 23 ACTIVELY SENDING THAT INFORMATION AROUND AND CIRCULATING IT TO
04:06PM 24 VICTIMS. THAT WOULD BE TOO GREAT A LOOPHOLE.

04:06PM 25 AS TO "THE WALL STREET JOURNAL" ARTICLE AND SOME OF THE

04:06PM 1 NEGATIVE PRESS COVERAGE, AGAIN, LET ME EMPHASIZE, THE
04:06PM 2 GOVERNMENT DOES NOT INTEND TO INTRODUCE ANY OF THAT FOR THE
04:06PM 3 TRUTH OF THE MATTERS ASSERTED IN THOSE ARTICLES.

04:06PM 4 FOR EXAMPLE, "THE WALL STREET JOURNAL ARTICLE" FROM
04:06PM 5 OCTOBER 2013 REVEALED THAT THERANOS WAS RELYING ON THIRD PARTY
04:06PM 6 MANUFACTURED DEVICES. THAT WILL BE PROVEN THROUGH AN ABUNDANCE
04:06PM 7 OF OTHER EVIDENCE IN THE CASE. WE WON'T BE ASKING THE JURY TO
04:06PM 8 BELIEVE THAT BECAUSE THE ARTICLE SAYS SO, BUT THAT
04:06PM 9 "WALL STREET JOURNAL" ARTICLE IS AN IMPORTANT LANDMARK IN THE
04:06PM 10 TIMELINE OF THIS CASE BECAUSE IT SHOWS WHEN KNOWLEDGE OF THE
04:06PM 11 ALLEGED FRAUD BECAME PUBLIC.

04:06PM 12 AND ESPECIALLY IMPORTANT THERE ARE DEFENDANT'S AND HER
04:07PM 13 COCONSPIRATOR'S REACTIONS TO THAT ARTICLE IN THE TIME PERIOD
04:07PM 14 FOLLOWING THE RELEASE OF THE ARTICLE WHERE IT WAS SEEN THAT
04:07PM 15 DEFENDANT AND OTHERS DOUBLE DOWNED ON THE PREVIOUS
04:07PM 16 REPRESENTATIONS. THAT IS CERTAINLY RELEVANT TO INTENT TO
04:07PM 17 DEFRAUD, IT'S CERTAINLY RELEVANT TO KNOWLEDGE, AND IT SHOULD BE
04:07PM 18 ADMISSIBLE.

04:07PM 19 SO I'M HAPPY TO ANSWER ANY OTHER QUESTIONS THAT THE COURT
04:07PM 20 MIGHT HAVE ABOUT THOSE CATEGORIES. OTHERWISE I'LL --

04:07PM 21 THE COURT: I JUST HAVE ONE QUESTION. THE ARTICLE
04:07PM 22 THAT WAS IDENTIFIED AS I THINK NUMBER 5, WAS THAT SHARED? DO
04:07PM 23 YOU KNOW? WAS THAT SHARED WITH INVESTORS OR WITH THE BOARD? I
04:07PM 24 THINK IT'S NUMBER 5.

04:07PM 25 DO YOU HAVE ANY KNOWLEDGE OF THAT?

04:07PM 1 MR. BOSTIC: YOU KNOW, I DON'T KNOW OFFHAND,
04:07PM 2 YOUR HONOR. I APOLOGIZE. I DO KNOW THAT A VARIETY OF ARTICLES
04:07PM 3 WERE ACTIVELY POSTED ON THE WEBSITE, TWEETED WITH MS. HOLMES'S
04:07PM 4 APPROVAL OR SHARED WITH THE BOARD OF INVESTORS. I DON'T KNOW
04:07PM 5 FOR THAT ONE OFFHAND.

04:07PM 6 THE COURT: ALL RIGHT.

04:07PM 7 MR. BOSTIC: BUT THAT'S PART OF THE GOVERNMENT'S
04:08PM 8 POINT IS THAT TO EXCLUDE ALL OF THESE ARTICLES AT THIS TIME
04:08PM 9 WITHOUT ALLOWING THE GOVERNMENT TO MAKE THAT SHOWING AS TO WHY
04:08PM 10 INDIVIDUAL ARTICLES MIGHT MATTER IS PREMATURE.

04:08PM 11 THE COURT: ALL RIGHT. THANK YOU.

04:08PM 12 I GUESS MY FIRST QUESTION, MR. LOOBY, IS, IS IT PREMATURE
04:08PM 13 TO RULE ON THIS MOTION NOW? AND SHOULD I DEFER THIS TO THE
04:08PM 14 TIME AND PLACE IF THE GOVERNMENT SEEKS TO INTRODUCE ANY
04:08PM 15 ARTICLES, AND THEN YOU'LL REMIND ME OF EVERYTHING THAT WE'VE
04:08PM 16 DISCUSSED THIS AFTERNOON?

04:08PM 17 MR. LOOBY: YOUR HONOR, I THINK IT WOULD BE FAIR TO
04:08PM 18 DEFER IT IN PART. I THINK WE STILL WOULD REQUEST AN ORDER.
04:08PM 19 YOU KNOW, THE GOVERNMENT DID CONCEDE THAT IT'S NOT OFFERING
04:08PM 20 THESE ARTICLES FOR THE TRUTH OF THE MATTER ASSERTED. I THINK
04:08PM 21 THAT'S IMPORTANT. THAT'S AN IMPORTANT CONCESSION.

04:08PM 22 I DIDN'T HEAR MUCH OF THE DEFENSE OF WHAT I WILL CALL THE,
04:08PM 23 LIKE, THE BACKGROUND INFORMATION. I GOT A LITTLE CONFUSED
04:08PM 24 ABOUT WHICH CATEGORIES MR. BOSTIC, HOW HE WAS NUMBERING THEM,
04:09PM 25 BUT I'M NOT SURE THAT I HEARD A ROBUST DEFENSE OF THE THEORY OF

04:09PM 1 KIND OF WHAT BACKGROUND INFORMATION IS AVAILABLE TO THE -- TO
04:09PM 2 LIKE THE GENERAL PUBLIC.

04:09PM 3 AND I THINK THAT THE COURT COULD RULE THAT THAT'S NOT
04:09PM 4 REALLY AN APPLICABLE THEORY THAT WILL BE AVAILABLE TO THE
04:09PM 5 GOVERNMENT. IT'S NOT PREMATURE TO RULE IN THAT MANNER NOW
04:09PM 6 BECAUSE, I MEAN, THESE EXHIBITS ARE ON THE GOVERNMENT'S EXHIBIT
04:09PM 7 LIST. TRIAL IS APPROACHING. THE SHEER VOLUME OF NEWS MEDIA
04:09PM 8 THAT THE GOVERNMENT HAS CHOSEN TO DISCLOSE AS EVIDENCE THAT IT
04:09PM 9 MIGHT SEEK TO ADMIT, IT POSES REAL TRIAL PREPARATION ISSUES
04:09PM 10 ABOUT KNOWING WHAT EVIDENCE IS OR ISN'T IN THE CASE.

04:09PM 11 BECAUSE WHEN MR. BOSTIC TALKS ABOUT ARTICLES THAT WERE
04:09PM 12 EITHER SHARED WITH INVESTORS OR ARTICLES HE SEEMED -- HIS
04:09PM 13 ARGUMENT SEEMED TO PRESUME THAT THE GOVERNMENT WOULD ACTUALLY
04:09PM 14 OFFER PROOF ON ALL OF THOSE FACTORS THAT I HAD PUT FORWARD AS
04:09PM 15 THEM NEEDING TO ME, WHICH WOULD BE THAT MS. HOLMES ACTUALLY
04:10PM 16 SHARED THE ARTICLE, THAT AN INVESTOR RECEIVED IT AND REVIEWED
04:10PM 17 IT, THAT IT CONTAINED A MISSTATEMENT THAT MS. HOLMES WAS AWARE
04:10PM 18 AND ALLEGED TO HAVE BEEN AWARE OF THE MISSTATEMENT.

04:10PM 19 THE GOVERNMENT'S EXPLANATION SOUNDS LIKE THEY PRESUME THAT
04:10PM 20 THEY'RE GOING TO DO HAVE TO DO ALL OF THAT, AND WE SUBMIT THAT
04:10PM 21 THAT'S GOING TO BE A VERY SMALL NUMBER OF ARTICLES PROBABLY
04:10PM 22 THAT WE'RE TALKING ABOUT.

04:10PM 23 BUT THE GOVERNMENT'S LIST HAS 50 ARTICLES ON IT, AND THEIR
04:10PM 24 THEORIES OF ADMISSIBILITY SUGGEST THAT BASICALLY ANY ARTICLE
04:10PM 25 ABOUT THERANOS IS FAIR GAME BECAUSE ALL OF THIS POSITIVE

04:10PM 1 PUBLICITY IS ILL-GOTTEN I SUPPOSE BECAUSE THEY'RE LABELLING IT
04:10PM 2 POSITIVE, BUT THEN MR. BOSTIC SAYS BUT SHE REPEATED THE
04:10PM 3 MISSTATEMENTS IN THEM DIRECTLY TO INVESTORS.

04:10PM 4 SO THAT KIND OF GIVES AWAY THE GAME. THEY'RE ACTUALLY
04:10PM 5 BEING OFFERED TO SHOW THAT THERE WAS MISSTATEMENTS MADE BY
04:10PM 6 MS. HOLMES IN WHICH CASE THERE'S THE THRESHOLD QUESTION OF,
04:11PM 7 WELL, DID MS. HOLMES MAKE THE STATEMENT? AND THE JOURNALIST IS
04:11PM 8 NOT GOING TO BE CALLED IN TO TESTIFY TO THAT TO BE
04:11PM 9 CROSS-EXAMINED TO THAT.

04:11PM 10 SO I THINK THAT THAT THRESHOLD ISSUE, HEARSAY ISSUE REALLY
04:11PM 11 PRECLUDES THAT ENTIRE FIRST BUCKET OF, I WOULD SAY, JUST LIKE
04:11PM 12 INFORMATION ECOSYSTEM.

04:11PM 13 AND I THINK, YOUR HONOR, YOU KIND OF HIT THE NAIL ON THE
04:11PM 14 HEAD WHEN YOU ASKED ABOUT THE DEGREE OF CONTROL OF MS. HOLMES
04:11PM 15 MIGHT HAVE ABOUT KIND OF HOW STORIES SPIN OUT ABOUT A COMPANY.
04:11PM 16 I THINK THAT THAT'S ACTUALLY LIKE A GOOD POINT TO MAKE. I
04:11PM 17 MEAN, WHEN YOU SIT DOWN FOR AN INTERVIEW WITH A JOURNALIST, YOU
04:11PM 18 KNOW, YOU GIVE AN INTERVIEW AND IN CONTROL, EXCEPT IN INSTANCES
04:11PM 19 WHERE YOU ARE GIVEN KIND OF A PREVIEW OF WHAT THE ARTICLE WOULD
04:11PM 20 BE, WHICH IN THIS CASE IS GOING TO BE A VERY LIMITED SET OF
04:11PM 21 ARTICLES, THAT'S KIND OF THE END OF YOUR CONTROL OVER WHAT
04:11PM 22 HAPPENS.

04:11PM 23 AND SO THE IDEA THAT SOMEBODY WHO IS AT THE CENTER OF A
04:11PM 24 MEDIA KIND OF, I GUESS YOU COULD SAY JUST A MEDIA ECOSYSTEM,
04:12PM 25 THAT THEY'RE KIND OF IN CONTROL OF EVERY STATEMENT OR EVERY

04:12PM 1 CHARACTERIZATION OF THEIR OWN STATEMENTS AND KIND OF
04:12PM 2 PUPPETEERING THAT IS A LITTLE BIT OUTDATED, AND IT DOESN'T
04:12PM 3 REFLECT REALITY.

04:12PM 4 SO THE IDEA THAT THERE'S GOING TO BE ANY ARTICLE ABOUT
04:12PM 5 THERANOS IS SOMETHING THAT COULD HAVE INFLUENCED AN INVESTOR
04:12PM 6 BECAUSE THEY GOT CAUGHT UP INTO THE FRENZY, WHICH I'M ALSO A
04:12PM 7 LITTLE BIT SUSPICIOUS THAT AN INVESTOR IS GOING TO COME IN AND
04:12PM 8 SAY, YOU KNOW, I INVESTED BECAUSE I GOT CAUGHT UP IN A FRENZY
04:12PM 9 ALSO DOESN'T RING TRUE OF WHAT THE EVIDENCE AT TRIAL WILL SHOW.

04:12PM 10 AND THEN THE SECOND BUCKET I THINK IS ALSO RIPE FOR A
04:12PM 11 RULING NOW PRETRIAL IF YOUR HONOR IS SO PREDISPOSED, AND THAT'S
04:12PM 12 THE MOTIVE BUCKET, BECAUSE, AGAIN, THE GOVERNMENT DOESN'T WANT
04:12PM 13 TO STIPULATE TO THE FACT OF POSITIVE PRESS WHICH YOUR HONOR HAD
04:13PM 14 SUGGESTED.

04:13PM 15 THEY DON'T WANT THAT BECAUSE THEY WANT THESE ARTICLES IN
04:13PM 16 THAT HAVE THESE KIND OF SUBJECTIVE TAKES ON THE COMPANY AND
04:13PM 17 THAT REFLECT THE AUTHORIAL POINT OF VIEW. AND SOMETIMES, EVEN
04:13PM 18 IN THE PERIOD OF TIME BEFORE, IN THE BUCKET THAT THE GOVERNMENT
04:13PM 19 MIGHT CHARACTERIZE AS POSITIVE, THERE ARE SKEPTICAL QUOTATIONS,
04:13PM 20 SOURCE OR TAKES ON THE EVIDENCE, AND THESE ARE FACTS AND PEOPLE
04:13PM 21 THAT THE JURY IS GOING TO MEET IN PERSON.

04:13PM 22 WE SUBMIT THAT THERE'S JUST NO REASON TO HAVE THESE
04:13PM 23 ARTICLES PUT IN KIND OF STACKING ON TOP OF EACH EITHER TO PROVE
04:13PM 24 A MOTIVE FOR PUBLICITY WHEN THEY POSE THOSE 403 RISKS.

04:13PM 25 I THINK FOR THE EFFECT ON THE READER AND FOR THE

04:13PM 1 ENDORSEMENT CIRCULATION THEORIES, I THINK I KIND OF ALREADY
04:13PM 2 DISCUSSED THIS A LITTLE BIT IN MY REBUTTAL, BUT I THINK THAT
04:13PM 3 THERE ARE GOING TO BE SOME THRESHOLD FACTUAL SHOWING THAT THE
04:13PM 4 GOVERNMENT IS GOING TO HAVE TO MAKE TO BE ABLE TO CLEAR THE
04:13PM 5 HEARSAY ISSUE.

04:14PM 6 I STILL -- WE DON'T REALLY HAVE ANY AUTHORITY FROM THE
04:14PM 7 GOVERNMENT THAT THE HEARSAY ISSUES WILL BE SOLVED BY THAT, AND
04:14PM 8 AT THAT POINT IT'S GOING TO BE THEIR BURDEN TO ADMIT THE
04:14PM 9 EVIDENCE. SO MAYBE THOSE ARE ISSUES UPON WHICH THE COURT COULD
04:14PM 10 DEFER RULING, BUT I THINK THAT THERE IS ROOM HERE FOR A
04:14PM 11 PRETRIAL RULING THAT WILL SET THE PARTIES' EXPECTATIONS KIND OF
04:14PM 12 ABOUT WHAT THE PLAYING FIELD IS.

04:14PM 13 AND THEN I FINALLY WANT TO SAY ONE LAST THING ABOUT KIND
04:14PM 14 OF THE NEGATIVE -- WHAT THE GOVERNMENT IS CALLING THE NEGATIVE
04:14PM 15 MEDIA COVERAGE. SO I THINK "THE WALL STREET JOURNAL" ARTICLE,
04:14PM 16 THE OCTOBER 2015 ARTICLE BY JOHN CARREYROU THAT MR. BOSTIC
04:14PM 17 SPECIFICALLY MENTIONED. THIS IS ALSO IN DEFENSE EXHIBIT 48,
04:14PM 18 ECF 586-2. AND THE TITLE OF IT IS "HOT STARTUP THERANOS HAS
04:15PM 19 STRUGGLED WITH ITS BLOOD TESTING TECHNOLOGY." AND THAT'S AT
04:15PM 20 ECF PAGES 12 TO 24.

04:15PM 21 AND THE GOVERNMENT SAYS, WELL, WE NEED TO PUT THIS IN
04:15PM 22 EVIDENCE TO KIND OF SHOW THE EFFECT, LIKE MS. HOLMES'S RESPONSE
04:15PM 23 TO IT OR THE COMPANY'S RESPONSE TO IT.

04:15PM 24 I WOULD SUBMIT THAT THE ARTICLE ITSELF DOES NOT NEED TO BE
04:15PM 25 ADMITTED FOR THOSE PURPOSES, AND THERE'S VERY SERIOUS CONCERNS

04:15PM 1 ABOUT ADMITTING IT FOR THOSE PURPOSES.

04:15PM 2 IT'S SOURCED FROM FORMER EMPLOYEES, MOST OF WHOM ARE
04:15PM 3 ANONYMOUS COMMENTING ON THERANOS'S BLOOD TESTING PROCEDURES.

04:15PM 4 THE COURT: SO, MR. LOOBY, IS THE COURT GOING TO BE
04:15PM 5 PUT IN A POSITION OF EXECUTIVE EDITOR AND HAVE TO READ THE
04:15PM 6 ARTICLES AND THEN MAKE A DETERMINATION?

04:15PM 7 MR. BOSTIC, IS THAT ULTIMATELY WHAT IS GOING TO HAVE TO
04:15PM 8 HAPPEN TO DETERMINE ADMISSIBILITY IN SOME OF THESE ISSUES THAT
04:15PM 9 MR. LOOBY IS TALKING ABOUT?

04:15PM 10 MR. BOSTIC: YOUR HONOR, I THINK NOT.

04:16PM 11 FOR ONE THING, IF THERE ARE CERTAIN LINES OR STATEMENTS IN
04:16PM 12 THE ARTICLES THAT CAUSE THE DEFENSE CONCERN, FOR EXAMPLE, I
04:16PM 13 KNOW THE DEFENSE HIGHLIGHTED FOR THE COURT A NUMBER OF NEGATIVE
04:16PM 14 OR UNFAVORABLE STATEMENTS IN THE ARTICLES, INCLUDING SOME OF
04:16PM 15 THE ARTICLES THAT ARE OVERALL POSITIVE.

04:16PM 16 THE GOVERNMENT IS WILLING TO WORK WITH THE DEFENSE TO
04:16PM 17 REDACT THOSE STATEMENTS, IF NECESSARY. THAT COULD BE ONE
04:16PM 18 POSSIBLE SOLUTION. I THINK THAT THE WAY THAT THESE ARTICLES
04:16PM 19 COME IN WILL MAKE A DIFFERENCE.

04:16PM 20 AS TO "THE WALL STREET JOURNAL ARTICLE," I DO THINK IT'S
04:16PM 21 NECESSARY FOR THE JURORS TO UNDERSTAND SOME OF THE CONTENT OF
04:16PM 22 THAT ARTICLE IN ORDER TO HAVE ANY UNDERSTANDING OF WHAT
04:16PM 23 MS. HOLMES AND THE COMPANY DO IN RESPONSE BOTH BEFORE AND AFTER
04:16PM 24 THAT ARTICLE COMES OUT WITHOUT THE SUBSTANCE OF THE ARTICLE NOT
04:16PM 25 INTRODUCED FOR THE TRUTH BUT AT LEAST AVAILABLE TO THE JURY,

04:16PM 1 THEY'LL HAVE NO WAY TO JUDGE OR UNDERSTAND WHAT AND WHY THE
04:16PM 2 DEFENDANT TAKES CERTAIN ACTIONS.

04:16PM 3 THE COURT: OKAY. THANK YOU.

04:16PM 4 MR. LOOBY: YOUR HONOR, I WOULD SAY THE TITLE KIND
04:16PM 5 OF SAYS IT ALL AND WILL EXPLAIN IT ENOUGH, "HOT STARTUP
04:17PM 6 THERANOS HAS STRUGGLED WITH ITS BLOOD TESTING TECHNOLOGY."

04:17PM 7 THE ARTICLE ITSELF CONTAINS QUOTES FROM PHYSICIANS AND
04:17PM 8 NURSES AND PATIENTS, SOME OF WHOM THE JURY WILL MEET AS TRIAL
04:17PM 9 WITNESSES. IT CONTAINS TRIPLE HEARSAY QUOTES FROM THE WIDOW OF
04:17PM 10 A DECEASED THERANOS EMPLOYEE RELAYING INFORMATION THAT HE
04:17PM 11 ALLEGEDLY CONVEYED TO HER ABOUT HIS TIME AT THERANOS.

04:17PM 12 IT CONTAINS ASSERTIONS SOURCED TO LAB EXPERTS, QUOTE, "LAB
04:17PM 13 EXPERTS UNNAMED ABOUT THERANOS'S LAB PRACTICES THAT SAY THAT
04:17PM 14 COULD LEAD TO ERRONEOUS RESULTS."

04:17PM 15 IT'S A GROSSLY PREJUDICIAL THING TO PUT BEFORE THE JURY
04:17PM 16 AND FOR THE LIMITED PURPOSE OF KIND OF EXPLAINING THE RESPONSE,
04:17PM 17 I DON'T THINK, WE SUBMIT, THAT WE DON'T THINK IT WILL BE
04:17PM 18 NECESSARY.

04:17PM 19 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. THANK
04:17PM 20 YOU.

04:17PM 21 ALL RIGHT. WE'RE DOWN TO 565 THAT MIGHT BE CONCURRENT
04:18PM 22 WITH THE GOVERNMENT'S NUMBER 8, I BELIEVE.

04:18PM 23 MS. SAHARIA: YES, YOUR HONOR, I'M GOING TO ADDRESS
04:18PM 24 THOSE.

04:18PM 25 THE COURT: ALL RIGHT. THANK YOU. LET ME INDICATE,

04:18PM 1 TOO, WHILE YOU COME FORWARD, WHEN WE FINISH WITH OUR DISCUSSION
04:18PM 2 ON MILS, I DO WANT TO TALK TO COUNSEL ABOUT A SEALED MATTER.
04:18PM 3 SO WE'LL GO INTO A SEALED SESSION AT THE TIME, AND I'LL LET YOU
04:18PM 4 KNOW THAT, AND WE'LL TERMINATE THE PHONE CALL, AND WE'LL GO
04:19PM 5 INTO A SEALED SESSION.

04:19PM 6 MS. SAHARIA: UNDERSTOOD, YOUR HONOR. LET ME JUST
04:19PM 7 GRAB A PEN.

04:19PM 8 AMY SAHARIA FOR MS. HOLMES.

04:19PM 9 AS YOUR HONOR INDICATED, THESE ARE TWO RELATED MOTIONS.
04:19PM 10 THEY ARE DISTINCT, BUT THEY RELATE TO SIMILAR ISSUES. THE
04:19PM 11 FIRST IS DEFENSE MOTION ECF 565, AND THE SECOND IS THE
04:19PM 12 GOVERNMENT'S MOTION NUMBER 8, ECF 588.

04:19PM 13 I CAN TAKE THEM HOWEVER YOUR HONOR WOULD LIKE. I CAN
04:19PM 14 ADDRESS OURS AND THEN LET THE GOVERNMENT RESPOND OR I CAN
04:19PM 15 ADDRESS THEM ALL TOGETHER. WHATEVER IS MOST CONVENIENCE.

04:19PM 16 THE COURT: I LIKE EFFICIENT -- EFFICIENCY IS WHAT I
04:19PM 17 LIKE.

04:19PM 18 MS. SAHARIA: ESPECIALLY AT THIS HOUR OF THE DAY.
04:19PM 19 SO I WILL TRY TO BE EFFICIENT.

04:19PM 20 JUST TO PUT THE TWO MOTIONS IN CONTEXT, OUR MOTION IS
04:19PM 21 BASED ON RELEVANCE, RULE 403 AND RULE 404(B) CONSIDERATIONS AS
04:19PM 22 IT RELATES TO CONDUCT AND STATEMENTS BY THERANOS EMPLOYEES.

04:20PM 23 THE GOVERNMENT'S MOTION, JUST TO BE CLEAR, IS NOT ABOUT
04:20PM 24 RELEVANCE. IT'S A LIMITED MOTION ABOUT KIND OF BASIC HEARSAY
04:20PM 25 PRINCIPLES. IT DOES NOT IDENTIFY THE PARTICULAR STATEMENTS IT

04:20PM 1 WISHES TO INTRODUCE. IT'S ASKING FOR A SORT OF ABSTRACT RULING
04:20PM 2 ON HOW THE HEARSAY PRINCIPLES APPLY TO STATEMENTS BY THERANOS
04:20PM 3 EMPLOYEES.

04:20PM 4 SO BOTH MOTIONS ARE ABOUT CONDUCT OR STATEMENTS BY
04:20PM 5 THERANOS EMPLOYEES, BUT THEY ADDRESS DIFFERENT LEGAL QUESTIONS.
04:20PM 6 SO IT'S A FUNDAMENTAL PRINCIPLE OF OUR CONSTITUTION THAT A
04:20PM 7 DEFENDANT IS CRIMINALLY LIABLE ONLY FOR HER OWN ACTS.

04:20PM 8 THERE ARE THREE WELL RECOGNIZED EXCEPTIONS TO THAT
04:20PM 9 PRINCIPLE. ONE IS FOR CONDUCT BY COCONSPIRATORS. THAT MAY BE
04:20PM 10 AN ISSUE FOR ANOTHER DAY IN THIS CASE, BUT THAT'S NOT THE
04:20PM 11 SUBJECT OF THIS PRESENT MOTION.

04:20PM 12 THE SECOND IS CONDUCT BY ACCOMPLICES. THAT'S ALSO NOT THE
04:20PM 13 SUBJECT OF THIS MOTION.

04:20PM 14 AND THE THIRD IS STRICT LIABILITY OFFENSES. WIRE FRAUD IS
04:20PM 15 NOT ONE OF THOSE OFFENSES.

04:21PM 16 ABSENT ONE OF THOSE EXCEPTIONS, THERE'S NO VICARIOUS
04:21PM 17 LIABILITY IN THE CRIMINAL LAW. MS. HOLMES IS NOT VICARIOUSLY
04:21PM 18 LIABLE FOR EVERYTHING THAT HAPPENED AT THERANOS JUST BECAUSE
04:21PM 19 SHE WAS CEO, NOR IS SHE VICARIOUSLY LIABLE BECAUSE SHE EXERTED
04:21PM 20 SOME SORT OF INFLUENCE AT THE COMPANY AS ALL CEO'S, OF COURSE,
04:21PM 21 DO.

04:21PM 22 THE GOVERNMENT'S RULE 404(B) NOTICE, VARIOUS ARGUMENTS AND
04:21PM 23 PLEADINGS THAT IT HAS MADE IN THIS CASE GAVE THE DEFENSE PAUSE
04:21PM 24 THAT THE GOVERNMENT INTENDS TO AT LEAST HINT AT VICARIOUS
04:21PM 25 LIABILITY TYPE ARGUMENTS TO THE JURY. IT HAS REPEATEDLY PUT AT

04:21PM 1 ISSUE IN VARIOUS ITERATIONS OF ITS 404(B) NOTICES CONDUCT BY
04:21PM 2 THERANOS AGENTS WITHOUT TYING THAT CONDUCT TO MS. HOLMES. IT
04:21PM 3 HAS SAID THINGS LIKE "SHE IS ON THE HOOK FOR WHAT HAPPENED AT
04:21PM 4 THE COMPANY," AND THAT WAS THE IMPETUS FOR THIS PARTICULAR
04:22PM 5 MOTION.

04:22PM 6 LET ME START WITH THE PARTICULAR EVIDENCE IDENTIFIED IN
04:22PM 7 THE RULE 404(B) NOTICE, AND THEN I'LL TURN TO KIND OF THE
04:22PM 8 BROADER CONSIDERATIONS AT TRIAL.

04:22PM 9 THE GOVERNMENT PRODUCED A REVISED RULE 404(B) NOTICE IN
04:22PM 10 SEPTEMBER THAT CONTAINS VAGUE REFERENCES TO THERANOS EMPLOYEES
04:22PM 11 AND IN SOME CASES DOES NOT TIE THAT CONDUCT TO MS. HOLMES.

04:22PM 12 WE CATALOG THOSE AT PAGES 3 TO 5 OF OUR MOTION. I DON'T
04:22PM 13 THINK IT'S NECESSARY FOR ME TO COVER THEM ALL HERE WITH THE
04:22PM 14 COURT, IN PARTICULAR BECAUSE THE GOVERNMENT DOESN'T RESPOND TO
04:22PM 15 THEM, BUT LET ME JUST HIGHLIGHT A FEW OF THOSE EXAMPLES.

04:22PM 16 THE FIRST IS THAT THE GOVERNMENT IDENTIFIES THE
04:22PM 17 EXPERIENCES OF VARIOUS PATIENTS AND SAYS THAT THOSE ARE
04:22PM 18 ADMISSIBLE TO PROVE NOTICE TO MS. HOLMES, BUT AS TO THREE OF
04:22PM 19 THOSE PATIENTS IT FAILS TO CONNECT THOSE IN IT'S 404(B) NOTICE
04:22PM 20 TO MS. HOLMES IN ANY WAY, WHICH GAVE US CONCERN THAT THE
04:23PM 21 GOVERNMENT INTENDS TO PURSUE SOME SORT OF IMPUTED KNOWLEDGE,
04:23PM 22 THEORY OR CONSTRUCTIVE NOTICE THEORY, AND THERE'S NO BASIS IN
04:23PM 23 THE CRIMINAL LAW FOR THAT KIND OF THEORY. EITHER MS. HOLMES
04:23PM 24 HAD KNOWLEDGE OR SHE DIDN'T HAVE KNOWLEDGE.

04:23PM 25 THE SECOND IS THAT THE GOVERNMENT IDENTIFIES CONVERSATIONS

04:23PM 1 BETWEEN UNIDENTIFIED THERANOS REPRESENTATIVES SUCH AS CUSTOMER
04:23PM 2 SERVICE REPRESENTATIVES AND DOCTORS AND CLAIMS THAT THOSE
04:23PM 3 REPRESENTATIVES MADE FALSE STATEMENTS TO THE DOCTORS WITHOUT
04:23PM 4 ESTABLISHING ANY CAUSAL CONNECTION BETWEEN MS. HOLMES AND THOSE
04:23PM 5 CONVERSATIONS.

04:23PM 6 THAT MAKES THOSE ALLEGATIONS VERY DIFFERENT FROM THE
04:23PM 7 PRINCIPAL CASE THAT THE GOVERNMENT RELIES ON THAT I KNOW THE
04:23PM 8 COURT IS FAMILIAR WITH, WHICH IS THE CICCONE CASE, AS MR. LOOBY
04:23PM 9 CALLED IT, THAT'S C-I-C-C-O-N-E, FROM THE NINTH CIRCUIT. IN
04:23PM 10 THAT CASE THE DEFENDANT ACTUALLY WROTE A SCRIPT FULL OF FALSE
04:24PM 11 STATEMENTS, GAVE THAT SCRIPT TO HIS EMPLOYEES, AND TOLD THE
04:24PM 12 EMPLOYEES WHO TO CALL WITH THAT SCRIPT.

04:24PM 13 THE COURT: THOSE WERE CALL CENTER TYPE CONDUCT?

04:24PM 14 MS. SAHARIA: EXACTLY. THAT'S RIGHT. HE WAS HELD
04:24PM 15 LIABLE FOR HIS OWN CONDUCT. HIS CONDUCT WAS IN INSTRUCTING HIS
04:24PM 16 EMPLOYEES TO MAKE FALSE STATEMENTS. AND, OF COURSE, WE'RE NOT
04:24PM 17 CHALLENGING THAT MS. HOLMES COULD BE LIABLE ON A THEORY THAT
04:24PM 18 SHE HERSELF DIRECTED PEOPLE TO DO SOMETHING.

04:24PM 19 OUR CONCERN HERE IS MORE ABOUT THESE BROADER THEORIES THAT
04:24PM 20 SHE'S LIABLE FOR THINGS HER EMPLOYEES DID EVEN IF SHE DIDN'T
04:24PM 21 DIRECT THOSE THINGS TO HAPPEN. SO THAT'S CATEGORY TWO.

04:24PM 22 CATEGORY THREE, WHICH I WILL NOT DWELL ON, IS ONE THAT
04:24PM 23 YOUR HONOR TALKED ABOUT WITH MR. WADE, WHICH IS THE
04:24PM 24 GOVERNMENT'S ALLEGATIONS WITH RESPECT TO THE PRODUCTION OF THE
04:24PM 25 LIS DATABASE TO THE GOVERNMENT AND THE SUBSEQUENT DISASSEMBLY

04:24PM 1 OF THAT DATABASE.

04:24PM 2 THE GOVERNMENT ALLEGED IN ITS 404(B) NOTICE THAT THOSE
04:24PM 3 ACTIONS ARE RELEVANT TO MS. HOLMES'S INTENT. THERE IS NOT ONE
04:25PM 4 SHRED OF EVIDENCE TYING THOSE ACTIONS TO MS. HOLMES. WE DIDN'T
04:25PM 5 HEAR ANY SHRED OF EVIDENCE FROM THE GOVERNMENT THE OTHER DAY ON
04:25PM 6 THAT TOPIC. ALL THEY SAID WAS THAT THEY CONTINUED TO
04:25PM 7 INVESTIGATE. ONE WOULD HOPE THAT THEY WOULD HAVE INVESTIGATED
04:25PM 8 BEFORE MAKING THAT INFLAMMATORY STATEMENT AS TO MS. HOLMES.
04:25PM 9 I'M CONFIDENT NO SUCH EVIDENCE EXISTS.

04:25PM 10 I'M NOT GOING TO DWELL ON THAT SINCE THAT HAS BEEN COVERED
04:25PM 11 AT LENGTH.

04:25PM 12 THE FOURTH, AND THIS TOUCHES ON A POINT THAT WE WERE JUST
04:25PM 13 DISCUSSING, AND THIS IS THE ONLY ONE WE RESPOND TO IN THEIR
04:25PM 14 OPPOSITION BRIEF, IS THAT THEY POINT TO ACTS BY OUTSIDE COUNSEL
04:25PM 15 AND AT BOIES SCHILLER AS WELL AS THERANOS'S INSIDE GENERAL
04:25PM 16 COUNSEL WITH RESPECT TO "THE WALL STREET JOURNAL" WHICH THEY
04:25PM 17 CLAIM ARE EVIDENCE OF MS. HOLMES'S MENTAL STATE. AGAIN, THEY
04:25PM 18 FAIL TO TIE THOSE ALLEGATIONS TO MS. HOLMES IN ANY WAY.

04:26PM 19 IN THEIR RESPONSE BRIEF THEY SIMPLY SAY IT'S IMPLAUSIBLE
04:26PM 20 THAT SHE DIDN'T DIRECT THOSE PARTICULAR ACTIONS. I WOULD
04:26PM 21 SUBMIT THAT'S MERE SPECULATION. THEY SHOULD COME FORWARD WITH
04:26PM 22 PROOF THAT SHE DIRECTED THESE ACTS AND THEY HAVE NOT DONE SO.
04:26PM 23 AND THIS IS A VERY DANGEROUS TERRITORY GIVEN THE ROLE OF
04:26PM 24 LAWYERS IN THESE PARTICULAR ACTIONS.

04:26PM 25 WE TOUCHED ON ONE OTHER CATEGORY THAT IS NOT SPECIFICALLY

04:26PM 1 MENTIONED HERE BUT WITH RESPECT TO THE CONDUCT OF THE COMPANY
04:26PM 2 VIS-A-VIS THE DEPARTURE OF CERTAIN EMPLOYEES AND WHAT HAPPENED
04:26PM 3 AFTER THEY LEFT THE COMPANY.

04:26PM 4 MY COLLEAGUE CHALLENGED THE GOVERNMENT JUST A FEW MINUTES
04:26PM 5 AGO TO ESTABLISH A CONNECTION TO MS. HOLMES, AND WE AGAIN HEARD
04:26PM 6 NO CONNECTION WHATSOEVER TO MS. HOLMES IN CONNECTION WITH THOSE
04:26PM 7 ACTIONS.

04:26PM 8 SO WE WOULD ASK THE COURT TO EXCLUDE ALL OF THE CATEGORIES
04:26PM 9 OR ALL OF THE EVIDENCE THAT WE HAVE IDENTIFIED AT PAGES 3 TO 5
04:26PM 10 OF OUR MOTION WHICH THE GOVERNMENT HAS NOT TIED TO MS. HOLMES.

04:26PM 11 THE SEPARATE QUESTION IS HOW DO WE DEAL WITH THIS ISSUE
04:27PM 12 MORE BROADLY AT TRIAL BECAUSE THERE ARE STATEMENTS IN THE
04:27PM 13 GOVERNMENT'S OPPOSITION BRIEF THAT GIVE US GREAT CONCERN THAT
04:27PM 14 THE GOVERNMENT DOESN'T KNOW WHERE TO DRAW THE LINE AND THAT
04:27PM 15 THEY MAY CONTINUE TO HINT AT THESE VICARIOUS LIABILITY KINDS OF
04:27PM 16 ARGUMENTS.

04:27PM 17 SO JUST AS A FEW EXAMPLES, AT OPPOSITION AT PAGE 6 THEY
04:27PM 18 SAY MS. HOLMES WAS WELL POSITIONED TO ENSURE THAT THE ACTIONS
04:27PM 19 OF THERANOS'S EMPLOYEES AND AGENTS FURTHERED DEFENDANT'S
04:27PM 20 SCHEMES WHENEVER POSSIBLE.

04:27PM 21 THEY SAY AGAIN AT OPPOSITION 6, HER WORDS AND ACTIONS HAD
04:27PM 22 A SIGNIFICANT EFFECT ON THE WAY THERANOS EMPLOYEES VIEWED THE
04:27PM 23 COMPANY.

04:27PM 24 THOSE KINDS OF GENERALITIES ABOUT SIGNIFICANT EFFECTS OR
04:27PM 25 INFLUENCE ARE NOT EVIDENCE. THEY ARE NOT HER DIRECTING

04:27PM 1 PARTICULAR ACTIONS TO OCCUR.

04:27PM 2 THE GOVERNMENT CITES NO CASE IMPUTING CRIMINAL LIABILITY
04:27PM 3 ON THOSE KINDS OF GENERALITIES.

04:27PM 4 SO WE WOULD ASK THE COURT TO ENTER AN ORDER LAYING GROUND
04:28PM 5 RULES TO GOVERN THIS TRIAL GOING FORWARD THAT WOULD REQUIRE
04:28PM 6 THAT THE GOVERNMENT TO PROVE THAT MS. HOLMES DIRECTED VARIOUS
04:28PM 7 ACTIONS TO OCCUR IF THEY ARE GOING TO PUT THESE BAD ACTS OR
04:28PM 8 ALLEGED BAD ACTS AND ALLEGEDLY FALSE STATEMENTS BY THERANOS'S
04:28PM 9 EMPLOYEES AT ISSUE IN THE CASE, THERE'S A VERY WELL ESTABLISHED
04:28PM 10 GROUND TO DO THAT. IT IS RULE 104(B) OF THE RULES OF EVIDENCE.

04:28PM 11 UNDER RULE 104(B), WHEN THE RELEVANCE OF EVIDENCE DEPENDS
04:28PM 12 ON WHETHER A FACT EXISTS, PROOF MUST BE INTRODUCED SUFFICIENT
04:28PM 13 TO SUPPORT A FINDING THAT A FACT DOES EXIST. THE COURT MAY
04:28PM 14 ADMIT THE PROPOSED EVIDENCE ON THE CONDITION THAT THE PROOF BE
04:28PM 15 INTRODUCED LATER.

04:28PM 16 SO IF THE GOVERNMENT IS GOING TO ATTEMPT TO PUT INTO
04:28PM 17 EVIDENCE ACTS BY THERANOS EMPLOYEES THAT IT ALLEGED TO BE BAD
04:28PM 18 ACTS OR FALSE STATEMENTS, IT SHOULD BE REQUIRED TO PROFFER AT
04:28PM 19 THAT TIME HOW IT INTENDS TO CONNECT THAT ACT TO MS. HOLMES SO
04:29PM 20 THAT WE DON'T END UP IN A SITUATION WHERE THEY PUT THAT INTO
04:29PM 21 EVIDENCE AND THEN THAT CONNECTION TO MS. HOLMES NEVER
04:29PM 22 MATERIALIZES.

04:29PM 23 SO I THINK WITH THAT MAYBE I'LL LET THE GOVERNMENT RESPOND
04:29PM 24 AND THEN WE CAN TURN TO THE GOVERNMENT'S MOTIONS, UNLESS YOU
04:29PM 25 PREFER FOR ME TO GO FORWARD WITH THIS.

04:29PM 1 THE COURT: WELL, MR. BOSTIC, ARE YOU SPEAKING TO
04:29PM 2 THIS?

04:29PM 3 MR. BOSTIC: YES, YOUR HONOR. GOOD AFTERNOON.

04:29PM 4 ACTUALLY, BECAUSE THESE MOTIONS ARE SO INTERRELATED, I
04:29PM 5 WOULD SUGGEST THAT WE ADDRESS THEM SIMULTANEOUSLY IN PARALLEL.
04:29PM 6 I THINK PART OF THE GOVERNMENT'S POINT HERE WILL BE THAT
04:29PM 7 BECAUSE THE HEARSAY RULES EXPRESSLY PROVIDE AN EXCEPTION AND
04:29PM 8 PERMIT THE INTRODUCTION OF STATEMENTS BY AGENTS AND EMPLOYEES,
04:29PM 9 THAT THAT DOES ACTUALLY LAY THE GROUNDWORK FOR THE ADMISSION OF
04:29PM 10 THESE STATEMENTS AND INCLUDING THE INSTANCES THAT MS. SAHARIA
04:29PM 11 JUST MENTIONED. SO I THINK IT DOES MAKE SENSE TO VIEW THEM IN
04:29PM 12 PARALLEL.

04:29PM 13 THE COURT: ALL RIGHT. THANK YOU.

04:29PM 14 ONE OF THE QUESTIONS I HAVE, AND I KNOW, MS. SAHARIA, WE
04:30PM 15 HAVE TO HAVE A DISCUSSION ABOUT AGENCY AND THE EXTENT OF AGENCY
04:30PM 16 AND WHETHER OR NOT THAT LIES HERE IN THE EVIDENCE AND FACTS IN
04:30PM 17 THIS CASE OR NOT, WHETHER OR NOT WE CAN TELL THAT NOW PRETRIAL
04:30PM 18 OR WHETHER THAT IS SOMETHING THAT, AS YOU AND OTHERS HAVE
04:30PM 19 SUGGESTED THIS IS SOMETHING THAT IS GOING TO, BECAUSE WE KNOW
04:30PM 20 TRIALS ARE FLUID, WHETHER OR NOT THIS IS SOMETHING THAT THE
04:30PM 21 COURT IS GOING TO HAVE TO ENTERTAIN AT THE TIME OF EITHER THE
04:30PM 22 ATTEMPT TO INTRODUCE OR THE MATTER COMES UP.

04:30PM 23 MS. SAHARIA: SURE. SO TWO RESPONSES TO THAT.

04:30PM 24 I THINK FOR SURE WHEN WE'RE TALKING ABOUT WHETHER AN
04:30PM 25 EMPLOYEE IS AN AGENT OF MS. HOLMES FOR THE PURPOSE OF THE

04:30PM 1 HEARSAY RULES, WE DO THINK THAT THAT IS NOT AN ISSUE THAT CAN
04:30PM 2 BE ADDRESSED NOW. THE GOVERNMENT WOULD HAVE TO LAY THE PROPER
04:30PM 3 FOUNDATION AT TRIAL, AND I CAN TURN TO WHAT THAT FOUNDATION
04:30PM 4 WOULD LOOK LIKE.

04:30PM 5 BUT I DISAGREE WITH MR. BOSTIC THAT THESE TWO ISSUES MERGE
04:30PM 6 TOGETHER. THEY'RE TWO DIFFERENT GROUNDS FOR EVIDENCE TO BE
04:31PM 7 ADMITTED, ONE OF WHICH IS HEARSAY AND ONE OF WHICH IS
04:31PM 8 RELEVANCE. AND IT MAY CERTAINLY BE THE CASE THAT IF THE
04:31PM 9 GOVERNMENT CAN ESTABLISH UNDER THE FACTORS THAT I'LL DISCUSS
04:31PM 10 THAT A PARTICULAR EMPLOYEE SHOULD QUALIFY AS AN AGENT OF
04:31PM 11 MS. HOLMES SO THAT A STATEMENT CAN COME IN AS -- FOR THE TRUTH
04:31PM 12 OF THE MATTER ASSERTED UNDER THE HEARSAY RULES, THAT'S ONE
04:31PM 13 THING, BUT TO SAY THAT MS. HOLMES IS THEN CRIMINALLY LIABLE FOR
04:31PM 14 THE ACTS OF AN AGENT, THAT IS JUST SAYING THERE IS VICARIOUS
04:31PM 15 LIABILITY UNDER THE SUBSTANTIVE CRIMINAL LAW, AND THERE'S NO
04:31PM 16 AUTHORITY FOR THAT.

04:31PM 17 THE GOVERNMENT HAS NOT CITED ANY AUTHORITY, AND THAT WOULD
04:31PM 18 BE I THINK A FLAGRANT VIOLATION OF THE DUE PROCESS CLAUSE.

04:31PM 19 SO, AGAIN, THESE ARE TWO DIFFERENT ISSUES. ONE, WHAT IS
04:31PM 20 SHE SUBSTANTIVELY LIABLE FOR? AND THAT GOES INTO WHAT IS
04:31PM 21 RELEVANT, WHAT COMES INTO THE CASE.

04:31PM 22 A TOTALLY SEPARATE QUESTION, ALTHOUGH IT INVOLVES THE SAME
04:31PM 23 ISSUES, IS UNDER THE HEARSAY RULES WHAT STATEMENTS CAN COME IN
04:31PM 24 FOR THE TRUTH OF THE MATTER ASSERTED.

04:32PM 25 SO I'M HAPPY TO TURN TO THAT PARTICULAR HEARSAY QUESTION.

04:32PM 1 AS I MENTIONED, THE GOVERNMENT IS ASKING THE COURT TO
04:32PM 2 ADMIT UNIDENTIFIED STATEMENTS. I DON'T THINK THE COURT COULD
04:32PM 3 ADMIT ANY STATEMENTS AT THIS POINT. IT'S REALLY KIND OF AN
04:32PM 4 ABSTRACT DISCUSSION ABOUT THE APPLICATION OF THE HEARSAY RULES.

04:32PM 5 AND WHAT THE GOVERNMENT IS ASKING FOR IN PARTICULAR IS A
04:32PM 6 BLANKET RULING THAT EVERY STATEMENT BY EVERY THERANOS EMPLOYEE
04:32PM 7 IS NONHEARSAY, AND THUS ADMISSIBLE FOR ITS TRUTH AS A STATEMENT
04:32PM 8 BY MS. HOLMES'S AGENT.

04:32PM 9 NOW, WE KNOW UNDER NINTH CIRCUIT LAW THAT WE LOOK TO
04:32PM 10 COMMON LAW AGENCY PRINCIPLES TO DECIDE WHO IS AN AGENT UNDER
04:32PM 11 RULE 801(D) (2) (D). UNDER COMMON LAW AGENCY PRINCIPLES,
04:32PM 12 EMPLOYEES AT THERANOS WERE NOT MS. HOLMES'S AGENTS. THEY WERE
04:32PM 13 AGENTS OF THERANOS, JUST LIKE SHE AS CEO WAS AN AGENT OF
04:32PM 14 THERANOS.

04:32PM 15 THE TWO -- MS. HOLMES AND EMPLOYEES OF THERANOS WERE
04:32PM 16 EFFECTIVELY COAGENTS OF THERANOS, AND WE CITED THE RESTATEMENT
04:33PM 17 OF AGENCY FOR THAT PRINCIPLE.

04:33PM 18 THE GOVERNMENT HASN'T IDENTIFIED ANY COMMON LAW AGENCY
04:33PM 19 PRINCIPALS THAT WOULD SUPPORT ITS INTERPRETATION.

04:33PM 20 NOW, UNDER THE GOVERNMENT'S RULE IT WANTS THE COURT TO
04:33PM 21 ADOPT THIS VERY BROAD NOVEL RULE THAT WOULD HOLD IN THE CASE OF
04:33PM 22 PRIVATE COMPANIES OWNED, AND CONTROLLED, AND MANAGED BY AN
04:33PM 23 INDIVIDUAL DEFENDANT, EVERY EMPLOYEE IS THE AGENT OF THE
04:33PM 24 DEFENDANT FOR PURPOSES OF RULE 801(D) (2) (D). THEY CITE NO
04:33PM 25 COMMON LAW AGENCY PRINCIPLE IN SUPPORT OF THAT RULE, AND NO

04:33PM 1 CASE ADOPTING THAT RULE.

04:33PM 2 THERE IS, IN FACT, A VERY WELL ESTABLISHED BODY OF CASE
04:33PM 3 LAW ADDRESSING WHO IS AN AGENT OF A CORPORATE EXECUTIVE FOR
04:33PM 4 PURPOSES OF 801(D)(2)(D). WE CITED THOSE CASES AT PAGES 15 TO
04:33PM 5 16 OF OUR OPPOSITION, AND IN THOSE CASES THE COURTS HAVE
04:33PM 6 UNIFORMLY REJECTED THE IDEA THAT ANY SUBORDINATE EMPLOYEE IS
04:33PM 7 ALWAYS CONSIDERED AN AGENT OF AN EXECUTIVE, AND THEY LOOK TO
04:34PM 8 THE DEGREE OF DAILY SUPERVISION BY THE DEFENDANT OVER A
04:34PM 9 DECLARANT.

04:34PM 10 SO THEY ASK QUESTIONS LIKE IS THE DECLARANT DIRECTLY
04:34PM 11 RESPONSIBLE TO THE DEFENDANT? WAS THE DECLARANT HIRED DIRECTLY
04:34PM 12 BY THE DEFENDANT? DID THE DECLARANT WORK ON MATTERS WHICH THE
04:34PM 13 DEFENDANT WAS ACTIVELY INVOLVED OR DID THE DEFENDANT DIRECT THE
04:34PM 14 DECLARANT'S WORK ON DAY-TO-DAY ON A CONTINUING BASIS?

04:34PM 15 SO WE CANNOT ANSWER THOSE QUESTIONS IN THE ABSTRACT.
04:34PM 16 THERE MIGHT BE SOME SMALL CATEGORY OF EMPLOYEES WHO COULD
04:34PM 17 QUALIFY UNDER THAT TEST, IF THAT IS A TEST THAT THE COURT WERE
04:34PM 18 TO APPLY, BUT THE GOVERNMENT HASN'T LAID ANY FOUNDATIONS FOR
04:34PM 19 THOSE FACTORS RIGHT NOW.

04:34PM 20 NOW, THE GOVERNMENT PRIMARILY RELIES ON TWO NINTH CIRCUIT
04:34PM 21 CASES, KIRK AND GIBSON. I THINK AS YOUR HONOR PROBABLY KNOWS
04:34PM 22 FROM READING THEM, THEY CONTAIN VERY LITTLE ANALYSIS AND IN
04:34PM 23 BOTH CASES THE HOLDING WAS AN ALTERNATE HOLDING, BUT I THINK
04:34PM 24 THOSE CASES ARE PERFECTLY CONSISTENT WITH THE WELL ESTABLISHED
04:35PM 25 BODY OF CASE LAW THAT I JUST DESCRIBED BECAUSE IN BOTH OF THOSE

04:35PM 1 CASES THE DEFENDANT WAS SUPERVISING THE DECLARANTS ON A
04:35PM 2 DAY-TO-DAY BASIS.

04:35PM 3 IN KIRK THE NINTH CIRCUIT SAID EXPRESSLY IN DISCUSSING THE
04:35PM 4 FACTS OF THE CASE THAT THE DEFENDANT RAN THE DAY-TO-DAY
04:35PM 5 OPERATIONS THAT WERE AT ISSUE IN THAT CASE. IT WAS A TIMESHARE
04:35PM 6 CLUB THAT WAS, YOU KNOW, FALSELY MAKING REPRESENTATIONS TO
04:35PM 7 CUSTOMERS.

04:35PM 8 AND THEN IN GIBSON, THIS IS ONE IS EVEN CLEARER, THE
04:35PM 9 DEFENDANT HIMSELF EXPRESSED OR INSTRUCTED THE SALESPEOPLE TO
04:35PM 10 CONVEY FALSE INFORMATION TO INVESTORS. SO VERY MUCH LIKE THE
04:35PM 11 CICCONE CASE. IT'S NOT SURPRISING THAT WHEN HE GAVE THOSE
04:35PM 12 DIRECT INSTRUCTIONS, THE COURT DEEMED THOSE EMPLOYEES TO BE
04:35PM 13 AGENTS.

04:35PM 14 SO WE THINK THAT THOSE CASES ARE CONSISTENT WITH THIS WELL
04:35PM 15 ESTABLISHED BODY OF CASE LAW THAT WE HAVE CITED AND THAT THE
04:35PM 16 COURT CAN'T DECIDE THIS ISSUE RIGHT NOW WITHOUT A FACTUAL
04:35PM 17 FOUNDATION FROM THE GOVERNMENT.

04:35PM 18 THE COURT: OKAY. THANK YOU.

04:35PM 19 MR. BOSTIC.

04:35PM 20 MR. BOSTIC: THANK YOU, YOUR HONOR.

04:35PM 21 SO THE IMPORTANT ISSUE RAISED BY THESE MOTIONS RELATES TO
04:36PM 22 HOW THE COURT WILL DEAL WITH EVIDENCE OF STATEMENTS AND ACTIONS
04:36PM 23 BY INDIVIDUALS OTHER THAN THE DEFENDANT BUT WHERE THOSE
04:36PM 24 STATEMENTS AND ACTIONS ARE STILL CLEARLY IN FURTHERANCE OF THE
04:36PM 25 FRAUD THAT THIS DEFENDANT ORIGINATED AND THAT THIS DEFENDANT

04:36PM 1 WAS THE PRINCIPAL MOTIVATING FORCE FOR.

04:36PM 2 THE DEFENSE CITES CASES ADDRESSING THE RISK THAT A
04:36PM 3 DEFENDANT WILL BE IMPROPERLY CONVICTED FOR THE INDEPENDENT
04:36PM 4 CONDUCT OF OTHERS. THAT'S THE LINE OF CASES CITED BY THE
04:36PM 5 DEFENSE IN ITS MOTION.

04:36PM 6 THAT RISK IS NONEXISTENT HERE. THERE IS NO INDEPENDENT
04:36PM 7 FRAUD THAT TOOK PLACE AT THERANOS.

04:36PM 8 TO THE EXTENT THAT THERANOS AGENTS AND EMPLOYEES MADE
04:36PM 9 FALSE STATEMENTS IN FURTHERANCE OF THE FRAUD, IT WAS IN
04:36PM 10 FURTHERANCE OF THE SAME FRAUD THAT CONSTITUTES THE BASIS FOR
04:36PM 11 THE CHARGED CONDUCT IN THIS CASE.

04:36PM 12 AND EVEN WHERE INDIVIDUAL STATEMENTS CANNOT BE TRACED BACK
04:36PM 13 TO HOLMES, IN OTHER WORDS, EVEN WHERE THE DEFENDANT DID NOT SAY
04:36PM 14 HERE'S A SCRIPT, I WANT YOU TO GO SAVE THIS, IT STILL
04:37PM 15 NONETHELESS IS CLEAR FROM THE EVIDENCE AS A WHOLE THAT THOSE
04:37PM 16 STATEMENTS, THE ALLEGED BAD ACTS BY THERANOS AGENTS AND
04:37PM 17 EMPLOYEES ARE THE RESULT OF, THEY FLOW DIRECTLY FROM THE FRAUD
04:37PM 18 AND MISSTATEMENTS MADE BY THE DEFENDANT IN THIS CASE GIVEN HER
04:37PM 19 ESSENTIALLY COMPLETE CONTROL OVER THE OPERATIONS OF THE
04:37PM 20 COMPANY.

04:37PM 21 THE COURT: SO I'M CURIOUS, HOW FAR DOES THAT
04:37PM 22 EXTEND, MR. BOSTIC? HOW FAR DO WE EXTEND THAT? DOES THAT GO
04:37PM 23 TO AN EMPLOYEE, A CUSTODIAN, SOMEBODY WHO IS IN CHARGE OF THE
04:37PM 24 PARKING LOT, SOMEBODY WHO IS IN CHARGE OF THE CAFETERIA AND
04:37PM 25 THEY MAKE A STATEMENT TO SOMEONE THAT THIS IS THE BEST COMPANY

04:37PM 1 THAT I HAVE EVER WORKED IN, AND I'VE NEVER BEEN TREATED BETTER
04:37PM 2 THAN THIS, THIS IS A SUCCESSFUL COMPANY, YOU SHOULD INVEST IN
04:37PM 3 THIS, IS SHE LIABLE FOR THAT?

04:37PM 4 MR. BOSTIC: SO TWO POINTS IN RESPONSE, YOUR HONOR.
04:38PM 5 FIRST, WE'RE HERE TO TALK ABOUT ADMISSIBILITY AND NOT
04:38PM 6 NECESSARILY LIABILITY.

04:38PM 7 SO A FACT CAN BE ADMISSIBLE EVEN IF THAT FACT DOES NOT
04:38PM 8 STANDING ALONE SUPPORT A CONVICTION. I HOPE THAT'S NOT A
04:38PM 9 CONTROVERSIAL POINT.

04:38PM 10 SO THE FALSE STATEMENT OR BAD ACT OF A THERANOS AGENT OR
04:38PM 11 EMPLOYEE CAN BE RELEVANT IN THIS CASE, IT CAN BE OKAY FOR THE
04:38PM 12 JURY TO HEAR ABOUT IT IF IT SHOWS THE EXISTENCE OF THE SCHEME
04:38PM 13 TO DEFRAUD, EVEN IF THAT STATEMENT ITSELF COULD NOT ON ITS OWN
04:38PM 14 SUPPORT THE CONVICTION OF THE DEFENDANT.

04:38PM 15 THE OTHER THING I WOULD SAY THERE IS THAT IT DOES MATTER
04:38PM 16 WHAT THE NATURE OF THE FALSE STATEMENT WAS. HERE THE
04:38PM 17 INDICTMENT LAYS OUT SEVERAL CATEGORIES OF SPECIFIC TYPES OF
04:38PM 18 FALSE STATEMENTS THAT THIS DEFENDANT MADE ALONG WITH HER
04:38PM 19 COCONSPIRATOR.

04:38PM 20 WHEN THE DEFENDANT MAKES THOSE MISSTATEMENTS, THOSE
04:38PM 21 MISREPRESENTATIONS TO INVESTORS, TO OTHER EMPLOYEES OF THE
04:38PM 22 COMPANY, TO JOURNALISTS AS WE RECENTLY DISCUSSED, THOSE FALSE
04:39PM 23 STATEMENTS BEGIN TO PERMEATE THE ATMOSPHERE AT THERANOS. IT'S
04:39PM 24 NO SURPRISE THAT HER AGENTS, HER EMPLOYEES THEN GO ON TO REPEAT
04:39PM 25 THOSE FALSE STATEMENTS THEREBY SPREADING THE FRAUD, SPREADING

04:39PM 1 THE MISUNDERSTANDING, SPREADING THAT FALSE INFORMATION. THAT
04:39PM 2 CAN HAPPEN EITHER BECAUSE THOSE EMPLOYEES UNDERSTAND THAT WHILE
04:39PM 3 THIS IS NOT EXACTLY TRUE, BUT THIS IS WHAT WE'RE SAYING. I
04:39PM 4 UNDERSTAND THIS BECAUSE I'VE GOTTEN DIRECTION FROM MY
04:39PM 5 SUPERIORS, INCLUDING THE DEFENDANTS IN THIS CASE, THAT THIS IS
04:39PM 6 HOW WE'RE GOING TO SPIN THIS ISSUE OR THIS IS HOW WE'RE GOING
04:39PM 7 TO REPRESENT WHAT IS HAPPENING HERE EVEN THOUGH IT MIGHT BE
04:39PM 8 MISLEADING.

04:39PM 9 THE COURT: I THINK THAT'S THE DISTINCTION, ISN'T
04:39PM 10 IT, THAT IF THE EVIDENCE SHOWS THAT MS. HOLMES ACTUALLY
04:39PM 11 DIRECTED PEOPLE AND HAD REGULAR MEETINGS, AND THEY CAME IN AND
04:39PM 12 SHE SAID I WANT YOU TO SAY THIS, YOU MUST, AND HERE'S THE
04:39PM 13 SCRIPT, I'M NOT GOING TO GIVE YOU PAPER BECAUSE I DON'T WANT A
04:40PM 14 PAPER TRAIL, BUT HERE'S WHAT I WANT YOU TO SAY ABOUT OUR
04:40PM 15 COMPANY AND NOTHING ELSE? THAT'S PRETTY EASY. I THINK THAT'S
04:40PM 16 PRETTY STRAIGHTFORWARD.

04:40PM 17 BUT IF SHE -- IF THE GOVERNMENT ALLEGES THAT SHE MADE
04:40PM 18 FALSE STATEMENTS TO NEWSPAPERS, TO INVESTORS, AND OTHER FOLKS
04:40PM 19 BUT DIDN'T HAVE THOSE MEETINGS WHERE SHE TOLD PEOPLE TO SAY
04:40PM 20 CERTAIN THINGS, AND I THINK WHAT YOU'RE SAYING IS THE SUCCESS
04:40PM 21 OF THERANOS BASED ON MS. HOLMES'S EFFORTS, YOU ATTRIBUTE THE
04:40PM 22 SUCCESS TO HER EFFORTS IN RECRUITING INVESTORS, THAT CREATES A
04:40PM 23 CULTURE OF SUCCESS, BUT IT'S ALSO A CULTURE OF DECEIT BECAUSE
04:40PM 24 IT WAS DECEIT AT THE OUTSET AND THAT SHE SHOULD, THEREFORE --
04:40PM 25 BECAUSE SHE CREATED THAT WITH INVESTORS, SHE'S RESPONSIBLE FOR

04:40PM 1 THE NATURAL AND PROBABLE CONSEQUENCES OF THAT?

04:40PM 2 MR. BOSTIC: I WOULD SAY IT'S SIMPLER AND MORE
04:41PM 3 CONCRETE THAN THAT, YOUR HONOR, WITH RESPECT.

04:41PM 4 I THINK INSTEAD I WOULD SAY WHERE A DEFENDANT WHO IS
04:41PM 5 PARTICIPATING IN A SCHEME TO DEFRAUD, WHO HAS DEVISED AND IS
04:41PM 6 ENGAGING IN A SCHEME TO DEFRAUD MAKES CERTAIN CATEGORIES OF
04:41PM 7 FALSE STATEMENTS REPEATEDLY OVER MONTHS AND OVER YEARS, MAKES
04:41PM 8 THOSE STATEMENTS PUBLICLY IN A WAY THAT ALLOWS HER EMPLOYEES
04:41PM 9 AND AGENTS TO BECOME AWARE THAT THIS IS WHAT MY SUPERIOR IS
04:41PM 10 SAYING, THE PERSON WHO IS DIRECTING THE WAY THAT I DO MY JOB IS
04:41PM 11 REPRESENTING THINGS TO THE WORLD IN THIS WAY, THAT WILL HAVE A
04:41PM 12 NATURAL AND UNAVOIDABLE EFFECT.

04:41PM 13 THE EFFECT WILL BE TO ENCOURAGE THOSE INDIVIDUALS, THOSE
04:41PM 14 SUBORDINATES, THOSE AGENTS TO MAKE SIMILAR STATEMENTS. AND IF
04:41PM 15 THOSE STATEMENTS ARE FALSE, THEN THAT WILL RESULT IN A
04:41PM 16 PERPETUATION, A PROPAGATION OF THE FRAUD IN THIS CASE, AND
04:41PM 17 THAT'S WHAT HAPPENED.

04:41PM 18 SO THAT'S NOT A SURPRISE.

04:41PM 19 THE COURT: MAY I ASK YOUR COLLEAGUE OPPOSITE HER
04:41PM 20 OPINION OF THAT?

04:41PM 21 MR. BOSTIC: YOUR HONOR, OF COURSE.

04:41PM 22 MS. SAHARIA: YES, YOUR HONOR.

04:41PM 23 THIS, TO ME, IS VERY DANGEROUS TERRITORY, AND THE REASON
04:42PM 24 FOR THAT IS THAT WITHOUT A DIRECTION BY MS. HOLMES OR SOME
04:42PM 25 ACTION BY HER THAT CONVEYS THAT SHE INTENDS FOR A FRAUDULENT

04:42PM 1 MISREPRESENTATION TO BE MADE, THE CRITICAL LINCHPIN ELEMENT OF
04:42PM 2 INTENT IS MISSING. SHE WASN'T CHARGED WITH DECEIVING HER
04:42PM 3 EMPLOYEES. SHE WAS CHARGED WITH DEFRAUDING INVESTORS AND
04:42PM 4 PAYING CUSTOMERS.

04:42PM 5 AND THE GOVERNMENT HAS TO ESTABLISH THAT SHE INTENDED FOR
04:42PM 6 FALSE REPRESENTATIONS TO BE MADE TO INVESTORS OR PAYING
04:42PM 7 CUSTOMERS FOR THE PURPOSE OF DEFRAUDING THEM.

04:42PM 8 AND TO SAY THAT, YOU KNOW, STATEMENTS SHE MADE PERMEATED
04:42PM 9 THE COMPANY, AND, THEREFORE, SHE MUST HAVE INTENDED FOR
04:42PM 10 PARTICULAR PEOPLE IN HER COMPANY TO MAKE PARTICULAR FALSE
04:42PM 11 REPRESENTATIONS TO PAYING CUSTOMERS OR INVESTORS, THIS IS --
04:42PM 12 IT'S VERY DANGEROUS. THERE'S NO -- WE HAVEN'T DRAWN A DIRECT
04:43PM 13 CAUSAL LINK. THERE'S NO CASES THAT HAVE ACKNOWLEDGED THIS KIND
04:43PM 14 OF CRIMINAL LIABILITY.

04:43PM 15 THE BEST CASE THAT WE HAVE WHERE THIS KIND OF THEORY, ANY
04:43PM 16 KIND OF THEORY LIKE THIS WORKED WAS THE CICCONE CASE WHERE
04:43PM 17 THERE WAS A DIRECTION FROM THE CEO.

04:43PM 18 AND I DON'T DISAGREE WITH YOUR HONOR THAT IF THERE WAS A
04:43PM 19 MEETING, OF COURSE, WHERE MS. HOLMES TOLD PEOPLE TO GO TELL THE
04:43PM 20 FOLLOWING MISREPRESENTATIONS, AND, OF COURSE, WE DON'T BELIEVE
04:43PM 21 THAT EVER HAPPENED, BUT OF COURSE IF THERE WAS THAT KIND OF
04:43PM 22 MEETING, WE'RE NOT DISPUTING THAT THAT SHOULD COME INTO
04:43PM 23 EVIDENCE.

04:43PM 24 THE COURT: THANK YOU, MR. BOSTIC.

04:43PM 25 MR. BOSTIC: SO, YOUR HONOR, HERE I THINK THE

04:43PM 1 DEFENSE WILL ACCUSE ME OF BLURRING THE ISSUES, BUT I THINK THAT
04:43PM 2 THE HEARSAY CASE LAW IS INSTRUCTIVE HERE BECAUSE WHEN WE GET TO
04:43PM 3 INTO THE CASE LAW DEALING WITH 801(B) (2) WE SEE THAT THE COURTS
04:43PM 4 ARE VERY COMFORTABLE ADMITTING STATEMENTS OF EMPLOYEES AND
04:43PM 5 AGENTS AS EVIDENCE OF AN ONGOING FRAUD, AND IT RELATES TO THE
04:44PM 6 RELATIONSHIP BETWEEN THE PRINCIPAL AND THE AGENT. AND CONTRARY
04:44PM 7 TO THE DEFENSE'S ARGUMENTS, IT DOESN'T COME DOWN TO A HYPER
04:44PM 8 TECHNICAL READING OF AGENCY LAW AS IT MIGHT MATTER FOR SOME
04:44PM 9 CONTRACT OR CIVIL MATTERS. INSTEAD, COURTS TAKE A MORE
04:44PM 10 FACT-SPECIFIC APPROACH, AND THEY LOOK AT THE DEGREE OF CONTROL
04:44PM 11 AND INFLUENCE EXERCISED BY THE PRINCIPLE.

04:44PM 12 AND HERE THOSE FACTS FAVOR THE ADMISSIBILITY OF THE
04:44PM 13 ACTIONS AND STATEMENTS OF THERANOS EMPLOYEES AS AGENTS.

04:44PM 14 THE GOVERNMENT CITES IN ITS BRIEF THE DEFENDANT'S OWN
04:44PM 15 STATEMENTS ABOUT HER DEGREE OF CONTROL AT THE COMPANY, HER
04:44PM 16 RESPONSIBILITY FOR THE OPERATIONS OF THE COMPANY. ALL OF THE
04:44PM 17 EVIDENCE AT TRIAL WILL BEAR THAT OUT.

04:44PM 18 SHE WAS THE MAJORITY OWNER OF THE COMPANY. SHE WAS THE
04:44PM 19 FOUNDER. SHE WAS THE FACE OF THE COMPANY IN EVERY SENSE. SHE
04:44PM 20 WAS INVOLVED IN ALL ASPECTS OF THE COMPANY'S OPERATION.

04:44PM 21 AND TO THE EXTENT THAT ANYONE HAD MORE CONTROL OVER A
04:45PM 22 CERTAIN ASPECT OF THE OPERATION, IT WAS HER COCONSPIRATOR AND
04:45PM 23 PARTNER, HER CODEFENDANT MR. BALWANI.

04:45PM 24 SO THERE'S NO WAY THAT THE DEFENSE FACTUALLY CAN ARGUE
04:45PM 25 THAT ANY EMPLOYEE'S ACTIVITIES WERE NOT ULTIMATELY UNDER THE

04:45PM 1 SUPERVISION AND CONTROL OF THE DEFENDANT HOLMES.

04:45PM 2 SHE ALSO WAS, OF COURSE, THE CEO. AND THE FACT THAT THIS
04:45PM 3 FRAUD INVOLVED A CORPORATION, THE FACT THAT THE CORPORATION AND
04:45PM 4 ITS EMPLOYEES BECAME A TOOL FOR THE FRAUD IS NO REASON TO
04:45PM 5 SHIELD THE PRINCIPAL, TO SHIELD THE DEFENDANT FROM THE
04:45PM 6 RESPONSIBILITY FOR THE EFFECT OF THE FRAUD THAT SHE CREATED.

04:45PM 7 AND I THINK THE KIRK AND GIBSON CASES ARE DIRECTLY ON
04:45PM 8 POINT HERE WHEN IT COMES TO THE FACT THAT THESE KINDS OF
04:45PM 9 STATEMENTS, AS LONG AS THE PRINCIPAL DEFENDANT HAS SUFFICIENT
04:45PM 10 CONTROL OVER THE OPERATIONS, THESE STATEMENTS CAN COME IN TO
04:46PM 11 PROVE THAT MISREPRESENTATIONS WERE MADE.

04:46PM 12 AGAIN, THESE CASES DEAL WITH THE MISSTATEMENTS COMING
04:46PM 13 IN -- I'M SORRY, THE AGENT STATEMENTS COMING IN FOR THE TRUTH
04:46PM 14 OF THE MATTER AS A HEARSAY EXCEPTION, BUT THEY ALSO MAKE CLEAR
04:46PM 15 LIKE IN KIRK WHERE IT SAYS THAT STATEMENTS OF SALESPERSONS
04:46PM 16 MISREPRESENTING THE PROGRAM OF THAT PARTICULAR BUSINESS WERE
04:46PM 17 ADMISSIBLE TO PROVE THAT THE MISREPRESENTATIONS WERE MADE, NOT
04:46PM 18 NECESSARILY TO PROVE THE TRUTH OF WHAT THE SALESPERSON STATED.
04:46PM 19 THAT WAS THE GROUNDS FOR ADMISSIBILITY IN THAT CASE. I THINK
04:46PM 20 THE SAME REASONING HOLDS TRUE HERE.

04:46PM 21 WHEN THE DEFENSE TALKS ABOUT THE TESTS FOR
04:46PM 22 ADMISSIBILITY -- EXCUSE ME, ADMISSIBILITY, AND TALKS ABOUT THE
04:46PM 23 DIFFERENT SCENARIOS UNDER WHICH AGENT STATEMENTS CAN COME IN
04:46PM 24 UNDER THIS THEORY, I THINK IT OVERSTATES THE RIGOR OF THOSE
04:46PM 25 SO-CALLED TESTS.

04:46PM 1 IN FACT, IF THE COURT LOOKS AT THE AGNE CASE, THAT'S THE
04:47PM 2 FIRST CIRCUIT, A-G-N-E, THAT'S A FIRST CIRCUIT CASE AT
04:47PM 3 214 F.3D 47. THAT COURT SIMILARLY SAID, "SO WHETHER THE
04:47PM 4 STATEMENTS OF A CORPORATE EMPLOYEE MAY BE ADMITTED AGAINST A
04:47PM 5 CORPORATE OFFICER, DEPENDS UPON THE RELATIONSHIP BETWEEN THE
04:47PM 6 EMPLOYEE AND THE OFFICER.

04:47PM 7 THAT COURT THEN GOES ON TO CITE OTHER CASES AND LISTS
04:47PM 8 OTHER SCENARIOS WHERE AN EMPLOYEE'S STATEMENT COULD BE VIEWED
04:47PM 9 AS AN AGENT ADMISSION OF THE PRINCIPAL, BUT THOSE ARE SIMPLY
04:47PM 10 EXAMPLES. IT'S NOT A MULTI FACTOR TEST I THINK AS THE DEFENSE
04:47PM 11 SUGGESTS. THESE ARE NOT THE ONLY SCENARIOS UNDER WHICH THIS
04:47PM 12 KIND OF THEORY APPLIES.

04:47PM 13 AND IF AN AGENT'S STATEMENT CAN COME IN AS AN ADMISSION
04:47PM 14 UNDER THE SAME RULE THAT GOVERNS THE DEFENDANT'S STATEMENTS,
04:47PM 15 THEN WHY OR HOW CAN IT BE SAID THAT IT'S NOT FAIR TO BRING IN
04:47PM 16 THAT SAME STATEMENT AS EVIDENCE THAT A SCHEME TO DEFRAUD WAS
04:47PM 17 OCCURRING AND THAT THIS WAS THE TOOL AND MECHANISM BY WHICH
04:48PM 18 VICTIMS WERE IN SOME CASES HEARING THESE FALSE STATEMENTS AND
04:48PM 19 BEING MISLED.

04:48PM 20 MS. SAHARIA: BRIEFLY.

04:48PM 21 MR. BOSTIC IS CONFLATING HEARSAY AND RELEVANCE, BUT
04:48PM 22 PUTTING THAT ASIDE, EVERY CASE THAT HAS ADMITTED A STATEMENT BY
04:48PM 23 AN EMPLOYEE AS AN EXECUTIVE'S AGENT, THE EXECUTIVE DIRECTLY
04:48PM 24 SUPERVISED THAT EMPLOYEE.

04:48PM 25 THERE ARE CASES WHERE THE STATEMENTS OF THE CFO ARE

04:48PM 1 IMPUTED TO THE CEO BECAUSE THE CEO DIRECTLY SUPERVISED THE CFO
04:48PM 2 ON A DAY-TO-DAY BASIS.

04:48PM 3 THERE IS NO CASE THAT HAS HELD THAT A CEO -- THAT THE
04:48PM 4 STATEMENTS OF 400 EMPLOYEES IN A CORPORATION ARE ADMISSIBLE
04:48PM 5 AGAINST A CORPORATE CEO.

04:48PM 6 MS. HOLMES DID NOT SUPERVISE ALL 400 EMPLOYEES OF HER
04:48PM 7 COMPANY; SHE DID NOT OVERSEE THE DAY-TO-DAY OPERATIONS OF THE
04:48PM 8 SALESPEOPLE; SHE DID NOT OVERSEE THE DAY-TO-DAY OPERATIONS OF
04:48PM 9 THE LABORATORY TECHNICIANS. THERE WERE MANY LAYERS BETWEEN HER
04:48PM 10 AND THOSE PEOPLE, AND NO CASE RECOGNIZES THAT KIND OF IMPUTING
04:49PM 11 UNDER THE HEARSAY RULES.

04:49PM 12 THE COURT: HER STATEMENT -- I THINK I SAW SOMETHING
04:49PM 13 THAT SAID -- ATTRIBUTED TO HER, "I AM THERANOS," OR "I HAVE
04:49PM 14 CONTROL," OR "I HAVE COMPLETE CONTROL OVER THE COMPANY,"
04:49PM 15 SOMETHING LIKE THAT. YOU PROBABLY KNOW WHAT I'M TALKING ABOUT.

04:49PM 16 MS. SAHARIA: YEAH. I THINK IT WAS "OF COURSE I'M
04:49PM 17 RESPONSIBLE FOR THE COMPANY." I THINK ANY CEO OF ANY COMPANY
04:49PM 18 WOULD SAY THE BUCK STOPS WITH ME, I'M RESPONSIBLE FOR THIS
04:49PM 19 COMPANY.

04:49PM 20 THAT DOESN'T MAKE THEM RESPONSIBLE FOR THE STATEMENTS OF
04:49PM 21 ALL OF THE HUNDREDS OF EMPLOYEES IN THAT COMPANY.

04:49PM 22 THE COURT: WHAT DOES IT DO? WHAT DOES IT SAY?
04:49PM 23 IT'S DESIGNED TO TELL INVESTORS, THE PUBLIC, I'M THE PUBLIC
04:49PM 24 FACE OF THE COMPANY, YOU CAN TRUST ME, AND I'M IN CHARGE. THE
04:49PM 25 BUCK STOPS WITH ME, SO TRUST ME.

04:49PM 1 MS. SAHARIA: WELL, THIS WAS TESTIMONY THAT SHE GAVE
04:49PM 2 TO THE S.E.C. AFTER ALL OF THE EVENTS IN QUESTION.

04:49PM 3 BUT I THINK A STATEMENT THAT "I'M RESPONSIBLE FOR THE
04:49PM 4 COMPANY" IS A STATEMENT THAT EVERY CEO WOULD MAKE. EVERY
04:49PM 5 CEO -- THAT'S THE PERSON WHO IS ULTIMATELY RESPONSIBLE.

04:50PM 6 THE COURT: IT'S THEIR JOB DESCRIPTION.

04:50PM 7 MS. SAHARIA: OF COURSE. IT DOESN'T MEAN THAT THEY
04:50PM 8 SUPERVISE EVERY EMPLOYEE OF THAT COMPANY EVERY DAY.

04:50PM 9 THE COURT: ALL RIGHT. THANK YOU.

04:50PM 10 MR. BOSTIC: YOUR HONOR, THE GOVERNMENT IS NOT
04:50PM 11 ASKING THE COURT TO RULE THAT THE STATEMENTS OR THAT ANY
04:50PM 12 STATEMENTS OF ANY OF THE 400 EMPLOYEES OF THERANOS WOULD BE
04:50PM 13 ADMISSIBLE.

04:50PM 14 I THINK WHERE WE MIGHT BE HEADED IS WHAT THE COURT
04:50PM 15 OUTLINED AT THE BEGINNING, WHICH IS THAT THIS MIGHT BE A FACT
04:50PM 16 SPECIFIC OR EVIDENCE SPECIFIC INQUIRY TO BE DECIDED IN THE
04:50PM 17 CONTEXT OF ACTUAL EVIDENCE.

04:50PM 18 BUT I'LL JUST NOTE THAT PRIMARILY THE STATEMENTS THAT
04:50PM 19 WOULD BE AT ISSUE HERE WOULD BE STATEMENTS MADE BY THE OUTWARD
04:50PM 20 FACING EMPLOYEES AT THERANOS. THOSE WOULD BE THE EMPLOYEES WHO
04:50PM 21 DEAL WITH THE MEDIA, THE EMPLOYEES WHO DEAL WITH DOCTORS AND
04:50PM 22 PATIENTS WHEN THERE ARE QUESTIONS OR PROBLEMS WITH TEST
04:50PM 23 RESULTS.

04:50PM 24 SO WE'RE NOT TALKING ABOUT THE ENTIRE SCOPE OF THE COMPANY
04:50PM 25 BY ANY MEASURE, CERTAINLY NOT CUSTODIANS. GENERALLY NOT LAB

04:50PM 1 TECHNICIANS, EITHER, WHEN IT COMES TO FALSE STATEMENTS MADE TO
04:50PM 2 PEOPLE ON THE OUTSIDE.

04:50PM 3 THE EVIDENCE DOES SHOW THAT THE DEFENDANT WAS VERY
04:51PM 4 INVOLVED WITH THERANOS'S DEALINGS WITH THE MEDIA, HAD
04:51PM 5 SIGNIFICANT INFLUENCE IN HOW CUSTOMER FACING STAFF MESSAGED
04:51PM 6 PROBLEMS WITH THERANOS TESTS TO PATIENTS AND DOCTORS WHO CALLED
04:51PM 7 WITH PROBLEMS.

04:51PM 8 SO IT IS ABSOLUTELY FAIR AND ONLY LOGICAL TO ALLOW THE
04:51PM 9 STATEMENTS THAT PEOPLE UNDER HER DIRECTION MADE IN THE COURSE
04:51PM 10 OF THEIR EMPLOYMENT. THOSE STATEMENTS ARE ADMISSIBLE UNDER THE
04:51PM 11 SUBSECTION OF 801(D) (2) DEALING WITH STATEMENTS MADE BY A
04:51PM 12 PARTY'S AGENT OR EMPLOYEE, AND THEY'RE ALSO ADMISSIBLE UNDER
04:51PM 13 SUBSECTION (C) BECAUSE THEY WERE MADE BY PEOPLE WHOM THE PARTY
04:51PM 14 AUTHORIZED TO MAKE A STATEMENT ON THE SUBJECT.

04:51PM 15 AGAIN, THESE ARE PEOPLE, THERANOS EMPLOYEES ACTING
04:51PM 16 SQUARELY WITHIN THE SCOPE OF THEIR EMPLOYMENT AND
04:51PM 17 COINCIDENTALLY BUT NOT COINCIDENTALLY FURTHERING THE FRAUD
04:51PM 18 PERPETRATED BY THEIR SUPERIOR.

04:51PM 19 THE COURT: SHOULD I, SHOULD I EVEN ASK WHETHER OR
04:51PM 20 NOT THE CODEFENDANT'S STATEMENTS ARE GOING TO BE AN ISSUE? IS
04:52PM 21 THAT SOMETHING THAT WE DON'T HAVE TO DISCUSS TODAY?

04:52PM 22 MS. SAHARIA: I DON'T THINK WE HAVE TO DISCUSS THAT
04:52PM 23 TODAY, YOUR HONOR.

04:52PM 24 THE COURT: OKAY.

04:52PM 25 MS. SAHARIA: I WOULD JUST CONCLUDE WITH TWO POINTS.

04:52PM 1 IF THEY HAVE EVIDENCE THAT SHE DID CONTROL PARTICULAR
04:52PM 2 STATEMENTS MADE TO DOCTORS, THEN THEY CAN SUBMIT THAT EVIDENCE.
04:52PM 3 WE'RE NOT CONTESTING THAT.

04:52PM 4 WE'RE CONTESTING THAT THEY CAN INFER FROM PARTICULAR
04:52PM 5 INSTANCES OF THAT HAPPENING THAT SHE CONTROLLED EVERY MESSAGE
04:52PM 6 TO EVERY DOCTOR.

04:52PM 7 SECONDLY, WITH RESPECT TO LAB TECHNICIANS, IN OUR
04:52PM 8 DISCUSSIONS YESTERDAY ABOUT CMS AND FDA THE GOVERNMENT
04:52PM 9 REPEATEDLY SAID THAT ALL OF THE DOUBLE HEARSAY PROBLEMS AND THE
04:52PM 10 CMS AND FDA REPORTS ARE SOLVED BY THE FACT THAT THE LAB
04:52PM 11 TECHNICIANS ARE MS. HOLMES'S AGENTS. SO THAT QUESTION IS
04:52PM 12 SQUARELY BEFORE THE COURT WITH RESPECT TO LAB PERSONNEL AS
04:52PM 13 WELL.

04:52PM 14 THE COURT: OKAY.

04:52PM 15 MS. SAHARIA: THERE IS ONE REMAINING ISSUE, WHICH IS
04:52PM 16 THE GOVERNMENT'S MOTION TO INTRODUCE INTERROGATORY RESPONSES BY
04:53PM 17 THERANOS. SHOULD WE ADDRESS THAT, YOUR HONOR?

04:53PM 18 THE COURT: WE MIGHT AS WELL SINCE WE HAVE SOME
04:53PM 19 TIME, YES.

04:53PM 20 MS. SAHARIA: YES. THIS IS A SEPARATE ISSUE FROM
04:53PM 21 THE ONE WE WERE JUST DISCUSSING. THIS IS THE SECOND PART OF
04:53PM 22 THE GOVERNMENT'S MOTION NUMBER 8.

04:53PM 23 THE GOVERNMENT WANTS THE COURT TO ADMIT VARIOUS
04:53PM 24 INTERROGATORY RESPONSES THAT THERANOS, THE COMPANY, MADE IN
04:53PM 25 CIVIL LITIGATION. THIS IS CLASSIC HEARSAY. THE GOVERNMENT --

04:53PM 1 THEY'RE OUT-OF-COURT STATEMENTS BY A THIRD PARTY THAT THE
04:53PM 2 GOVERNMENT WANTS TO BE ADMITTED FOR THEIR TRUTH, AND SO THEY'VE
04:53PM 3 INVOKED TWO EXCEPTIONS. THEY ARGUE THAT FIRST MS. HOLMES
04:53PM 4 AUTHORIZED THE STATEMENTS, AND, SECOND, THAT SHE ADOPTED THE
04:53PM 5 STATEMENTS. THERE'S NO EVIDENCE OF EITHER.

04:53PM 6 JUST AS BACKGROUND, THESE RESPONSES WERE MADE IN CIVIL
04:53PM 7 LITIGATION IN LATE 2016 AND EARLY 2017.

04:53PM 8 THE THERANOS'S RESPONSES FOR THE RECORD ARE GOVERNMENT'S
04:54PM 9 EXHIBIT P, Q, AND R.

04:54PM 10 THE GOVERNMENT HAD ALREADY COMMENCED ITS GRAND JURY
04:54PM 11 INVESTIGATION BY THE TIME OF THESE INTERROGATORY RESPONSES, AND
04:54PM 12 FOR THAT REASON MS. HOLMES AND THERANOS ARE SEPARATE COUNSEL IN
04:54PM 13 THIS LITIGATION.

04:54PM 14 WILMER HALE REPRESENTED THERANOS AND COOLEY REPRESENTED
04:54PM 15 MS. HOLMES.

04:54PM 16 THE THERANOS INTERROGATORY RESPONSES WERE SIGNED BY
04:54PM 17 WILMER, NOT BY COOLEY, AND ALTHOUGH MULTIPLE THERANOS EMPLOYEES
04:54PM 18 VERIFIED THOSE RESPONSES AS IS NORMAL, MS. HOLMES WAS NOT ONE
04:54PM 19 OF THEM. SHE DID NOT VERIFY THOSE RESPONSES.

04:54PM 20 THERE'S JUST NO EVIDENCE WHATSOEVER THAT MS. HOLMES
04:54PM 21 HERSELF AUTHORIZED THE CONTENT OF THOSE RESPONSES.

04:54PM 22 THE GOVERNMENT OFFERS A FEW ARGUMENTS IN ITS REPLY BRIEF,
04:54PM 23 WHICH I'LL ADDRESS. THE FIRST IS THAT THE RESPONSES WERE
04:54PM 24 VERIFIED BY COMPANY EMPLOYEES, ONE OF WHICH WAS HER BROTHER WHO
04:55PM 25 WAS AN EMPLOYEE OF THE COMPANY. THERE'S NO BROTHER EXCEPTION

04:55PM 1 TO THE HEARSAY RULES, AND IT'S NOT CLEAR TO ME THAT ANY OF
04:55PM 2 THOSE ARE STATEMENTS OF THOSE PARTICULAR EMPLOYEES. AND THEN
04:55PM 3 THAT WOULD RAISE ALL OF THE SAME AGENT ISSUES THAT WE WERE JUST
04:55PM 4 DISCUSSING ANYWAY.

04:55PM 5 THE SECOND IS THAT THE WILMER HALE ATTORNEYS WHO
04:55PM 6 REPRESENTED THE COMPANY ALSO REPRESENTED HER AS CEO OF THE
04:55PM 7 COMPANY. WE'VE DISCUSSED THAT EARLIER TODAY. THERE'S NO
04:55PM 8 EVIDENCE THAT WILMER HALE WAS REPRESENTING HER IN HER PERSONAL
04:55PM 9 CAPACITY IN CONNECTION WITH THE CIVIL LITIGATION. ALL OF THE
04:55PM 10 EVIDENCE IS TO THE CONTRARY. SHE WAS REPRESENTED BY COOLEY.

04:55PM 11 THEY POINT OUT HER DEPOSITION TESTIMONY TO THE S.E.C.
04:55PM 12 WHERE SHE WAS PRESENTED WITH THESE INTERROGATORY RESPONSES.
04:55PM 13 AND SHE SAID -- SHE DIDN'T SAY SHE APPROVED THEM OR AUTHORIZED
04:55PM 14 THEM. SHE DIDN'T KNOW IF SHE HAD SEEN THEM. SHE DIDN'T RECALL
04:55PM 15 WHAT A RULE WAS RESPONDING TO THEM. ALL SHE SAID WAS SHE
04:55PM 16 ENGAGED WITH AND WORKED WITH A LEGAL TEAM IN RESPONDING TO
04:56PM 17 THEM.

04:56PM 18 EVEN IF THAT'S THE CASE, EVEN IF SHE WORKED WITH THE
04:56PM 19 ATTORNEYS AND RESPONDING TO THEM, IT DOESN'T MEAN THAT SHE
04:56PM 20 APPROVED THE CONTENT OF EVERY SINGLE ONE OF THOSE INTERROGATORY
04:56PM 21 RESPONSES.

04:56PM 22 IF IT WERE OTHERWISE ANY EMPLOYEE WHO WORKED WITH ANY
04:56PM 23 ATTORNEY WOULD SOMEHOW BE DEEMED TO HAVE AUTHORIZED ALL OF THE
04:56PM 24 CONTENT OF THOSE RESPONSES.

04:56PM 25 SO FOR ALL OF THOSE REASONS THERE'S JUST NO EVIDENCE THAT

04:56PM 1 SHE AUTHORIZED THEM.

04:56PM 2 SO THE GOVERNMENT HAS A BACKUP ARGUMENT. THE BACKUP
04:56PM 3 ARGUMENT IS THAT SHE SERVED HER OWN INTERROGATORY RESPONSES
04:56PM 4 SIGNED BY COOLEY AND THAT SHE ADOPTED THE THERANOS RESPONSES IN
04:56PM 5 HER OWN RESPONSES.

04:56PM 6 THERE'S A COUPLE OF PROBLEMS WITH THAT ONE. THE FIRST IS
04:56PM 7 THAT THERE'S NO BASIS TO CONCLUDE THAT SHE ADOPTED ALL OF THE
04:56PM 8 THERANOS RESPONSES.

04:56PM 9 AT MOST THE GOVERNMENT POINTS TO PARTICULAR ANSWERS WHERE
04:56PM 10 SHE CROSS-REFERENCED OTHER ANSWERS, SO IT WOULD HAVE TO BE SOME
04:56PM 11 SORT OF PARTIAL INCORPORATION ARGUMENT.

04:57PM 12 JUST AS ONE EXAMPLE, THE GOVERNMENT SAYS IN ITS MOTION
04:57PM 13 THAT IT WANTS TO INTRODUCE THERANOS'S STATEMENT ABOUT THE
04:57PM 14 NUMBER OF TESTS THAT IT RAN ON ITS PROPRIETARY DEVICE IN ITS
04:57PM 15 CLINICAL LAB. THAT WAS MADE BY THERANOS IN RESPONSE TO
04:57PM 16 EXHIBIT -- TO INTERROGATORY NUMBER 15, WHICH IS AT GOVERNMENT
04:57PM 17 EXHIBIT P.

04:57PM 18 BUT NONE OF MS. HOLMES'S RESPONSES CROSS-REFERENCE
04:57PM 19 THERANOS RESPONSE NUMBER 15. THERE'S JUST NO BASIS TO CONCLUDE
04:57PM 20 THAT SHE ADOPTED THAT ONE AT ALL.

04:57PM 21 WITH RESPECT TO THE ONES THAT SHE DID CROSS-REFERENCE, SHE
04:57PM 22 DIDN'T ADOPT THEM. SHE DIDN'T EXPRESS HER BELIEF THAT THEY
04:57PM 23 WERE TRUE. SHE SIMPLY POINTED THE COUNTERPARTY TO THE THERANOS
04:57PM 24 ONE.

04:57PM 25 AS ONE EXAMPLE IN EXHIBIT V, THIS IS MS. HOLMES'S

04:57PM 1 RESPONSES, IN RESPONSE TO NUMBER 45 SHE SAYS MS. HOLMES
04:57PM 2 RESPONDS THAT SHE WAS NOT PERSONALLY INVOLVED IN MODIFICATION
04:57PM 3 OF COMMERCIALLY AVAILABLE MACHINES, EQUIPMENT OR TECHNOLOGY
04:58PM 4 THAT THERANOS USED TO PROCESS BLOOD TESTS ON CAPILLARY BLOOD
04:58PM 5 SAMPLES OR MICRO SAMPLES. THE SAME INTERROGATORY WAS DIRECTED
04:58PM 6 TO THE COMPANY, AND HOLMES REFERS PLAINTIFF TO THERANOS'S
04:58PM 7 RESPONSE INTERROGATORY NUMBER 64.

04:58PM 8 THAT WAS THE KIND OF LANGUAGE SHE WOULD USE TO REFER THE
04:58PM 9 COUNTERPARTY TO THE THERANOS RESPONSE, BUT NOTHING THERE ADOPTS
04:58PM 10 IT AS HER OWN. IN FACT, SHE SAID SHE WAS NOT INVOLVED IN THAT
04:58PM 11 PARTICULAR ISSUE.

04:58PM 12 SO THE GOVERNMENT CITES NO CASE THAT HOLDS THIS KIND OF
04:58PM 13 MUTUAL LANGUAGE TO BE AN ADOPTION, AND WE SUBMIT THAT THERE'S
04:58PM 14 NO BASIS TO CONCLUDE THAT SHE EITHER AUTHORIZED OR ADOPTED
04:58PM 15 THOSE SEPARATE THERANOS'S RESPONSES.

04:58PM 16 THE COURT: THANK YOU. MR. BOSTIC.

04:58PM 17 MR. BOSTIC: THANK YOU, YOUR HONOR. JUST VERY
04:58PM 18 BRIEFLY.

04:58PM 19 THE EVIDENCE DISCUSSED BY THE DEFENSE IS ADMISSIBLE FOR
04:58PM 20 THE VERY REASONS DISCUSSED BY THE DEFENSE.

04:58PM 21 WHEN IT COMES TO WHETHER WILMER HALE REPRESENTED THE
04:58PM 22 DEFENDANT AT THAT TIME, I THINK THE DEFENSE SAID THERE'S NO
04:58PM 23 EVIDENCE THAT THAT'S THE CASE, BUT THAT'S FALSE. THERE IS
04:59PM 24 EVIDENCE, AND IT'S CITED IN THE GOVERNMENT'S BRIEF. THAT
04:59PM 25 EVIDENCE IS AT GOVERNMENT'S EXHIBIT U, PAGES 1 THROUGH 4 AND 13

04:59PM 1 WHERE IT IS CLEAR THAT WILMER HALE IS REPRESENTING MS. HOLMES
04:59PM 2 AS WELL AS THE COMPANY THERANOS ITSELF.

04:59PM 3 THE FACT THAT SHE MAY HAVE ALSO HAD HER OWN COUNSEL AT
04:59PM 4 COOLEY DOES NOT MEAN THAT THE WILMER HALE ATTORNEYS WERE NOT
04:59PM 5 ALSO REPRESENTING HER.

04:59PM 6 AND IN THE ABSENCE OF ANY EVIDENCE TO THE CONTRARY, THE
04:59PM 7 COURT SHOULD TAKE EXHIBIT U AT FACE VALUE.

04:59PM 8 WHEN IT COMES TO WHO ACTUALLY SIGNED THOSE INTERROGATORY
04:59PM 9 RESPONSES, I THINK THAT'S VERY IMPORTANT ALSO BECAUSE IT WAS
04:59PM 10 SIGNED BY SENIOR EMPLOYEES OF THE COMPANY, INCLUDING
04:59PM 11 MS. HOLMES'S BROTHER. THAT DOES MATTER.

04:59PM 12 NO, THERE'S NOT A BROTHER EXCEPTION IN THE HEARSAY RULE,
04:59PM 13 BUT NOW WE'RE BACK UNDER 801(B)(2)(C), AND WE'RE TALKING ABOUT
04:59PM 14 SPECIFIC EMPLOYEES. WE'RE NO LONGER IN THE ABSTRACT.

04:59PM 15 AND WHEN IT COMES TO THESE SPECIFIC EMPLOYEES, IT STRAINS
05:00PM 16 BELIEF TO ARGUE THAT THESE EMPLOYEES WERE NOT UNDER THE
05:00PM 17 SUPERVISION OF THE DEFENDANT AS CEO, IT STRAINS BELIEF TO ARGUE
05:00PM 18 THAT THEY WERE NOT AUTHORIZED TO MAKE THE STATEMENT OF SIGNING
05:00PM 19 AND VERIFYING THESE INTERROGATORY RESPONSES.

05:00PM 20 THE DEFENDANT AS CEO WOULD HAVE HAD THE PRIMARY
05:00PM 21 RESPONSIBILITY FOR DEALING WITH AND MANAGING THE COMPANY'S
05:00PM 22 LEGAL ISSUES, INCLUDING ITS RESPONSES TO LITIGATION. OF COURSE
05:00PM 23 SHE WORKED WITH ATTORNEYS REPRESENTING THE COMPANY AND CREATING
05:00PM 24 AND APPROVING THESE INTERROGATORY RESPONSES AS HER STATEMENTS
05:00PM 25 TO THE CEO DURING HER SWORN DEPOSITION CONFIRM.

05:00PM 1 THE FACT THAT SHE DIDN'T SPECIFICALLY REMEMBER APPROVING
05:00PM 2 EACH ONE IS NO BARRIER TO THEIR ADMISSION UNDER 801(D) (2) .

05:00PM 3 THE COURT: ALL RIGHT.

05:00PM 4 MS. SAHARIA.

05:00PM 5 MS. SAHARIA: THREE THINGS, YOUR HONOR.

05:00PM 6 EXHIBIT U, FIRST OF ALL, IS A DEPOSITION TRANSCRIPT FROM
05:01PM 7 THE S.E.C. PROCEEDINGS. IT IS NOT THE CIVIL LITIGATION THAT
05:01PM 8 WE'RE TALKING ABOUT. IT IS CRYSTAL CLEAR THAT MS. HOLMES HAD
05:01PM 9 SEPARATE COUNSEL IN THAT CIVIL LITIGATION. SHE WAS NOT
05:01PM 10 REPRESENTED BY WILMER.

05:01PM 11 TO THE EXTENT THAT THE GOVERNMENT IS CLAIMING NOW THAT
05:01PM 12 WILMER ACTUALLY REPRESENTED MS. HOLMES IN HER PERSONAL CAPACITY
05:01PM 13 COMES AS A GREAT SURPRISE TO US GIVEN ALL OF THE MANY PRIVILEGE
05:01PM 14 ISSUES THAT WE'VE BEEN LITIGATING WITH THE GOVERNMENT AND WE
05:01PM 15 MAY NEED TO TAKE THAT UP SEPARATELY.

05:01PM 16 SECOND OF ALL, AGAIN, WE HEAR THIS LANGUAGE THAT WE HAVE
05:01PM 17 HEARD ALL THROUGHOUT THESE HEARINGS, IT STRAINS BELIEF. THAT'S
05:01PM 18 JUST SPECULATION, THAT IS NOT EVIDENCE, AND IT DOES NOT STRAIN
05:01PM 19 BELIEF TO THINK THAT MS. HOLMES WAS NOT DIRECTLY SUPERVISING
05:01PM 20 THE WORK ON THESE INTERROGATORY RESPONSES FOR THE SIMPLE REASON
05:01PM 21 THAT I SAID, SHE HAD SEPARATE COUNSEL. AND THE REASON SHE HAD
05:01PM 22 SEPARATE COUNSEL WAS BECAUSE THE GRAND JURY INVESTIGATION HAD
05:01PM 23 ALREADY COMMENCED, AND UNDER THOSE KIND OF CIRCUMSTANCES, WHAT
05:01PM 24 COMPANIES AND EMPLOYEES OFTEN DO IS TO HAVE THEIR OWN
05:02PM 25 LITIGATION COUNSEL BECAUSE OF THE DANGERS OF HAVING ONE, YOU

05:02PM 1 KNOW, THE SAME LAWYER REPRESENT THE COMPANY AND THE DEFENDANT.

05:02PM 2 IN THAT CASE SHE HAD HER OWN COUNSEL. THERE'S NO
05:02PM 3 EVIDENCE THAT SHE SUPERVISED THE RESPONSES TO THESE
05:02PM 4 INTERROGATORIES. THERE'S NO EVIDENCE THAT THESE EMPLOYEES
05:02PM 5 REPORTED TO HER WITH RESPECT TO THE CONTENT OF THE
05:02PM 6 INTERROGATORIES.

05:02PM 7 THE GOVERNMENT IS COMPLETELY SPECULATING.

05:02PM 8 THE COURT: ALL RIGHT.

05:02PM 9 MR. BOSTIC: YOUR HONOR, JUST VERY BRIEFLY ON THAT.

05:02PM 10 THE COURT: YES, MR. BOSTIC.

05:02PM 11 MR. BOSTIC: SO I JUST WANT TO POINT OUT THAT WHEN
05:02PM 12 IT COMES TO SPECIFIC INVOLVEMENT IN THESE INTERROGATORIES, IT
05:02PM 13 WOULD BE ONE THING IF THE DEFENSE WERE ARGUING THAT THERE HAD
05:02PM 14 BEEN A WALL PUT UP BETWEEN THE COMPANY'S REPRESENTATION AND THE
05:02PM 15 DEFENDANT'S REPRESENTATION INDIVIDUALLY AND THAT SHE HAD NO
05:02PM 16 INVOLVEMENT.

05:02PM 17 THEY'RE NOT ARGUING THAT. THEY CAN'T ARGUE THAT IN LIGHT
05:02PM 18 OF HER STATEMENTS DURING THE DEPOSITION, BUT, YES, SHE BELIEVES
05:02PM 19 THAT SHE WAS INVOLVED IN THE PROCESS OF RESPONDING TO THESE
05:02PM 20 INTERROGATORY REQUESTS.

05:02PM 21 GIVEN THAT, IT IS SELF-EVIDENT THAT THE INDIVIDUALS AT
05:03PM 22 THERANOS WHO DID SIGN THESE INTERROGATORY REQUESTS WERE
05:03PM 23 AUTHORIZED TO DO SO BY THE DEFENDANT HERSELF AS CEO, THE PERSON
05:03PM 24 PRIMARILY RESPONSIBLE FOR THE COMPANY'S ACTIONS.

05:03PM 25 THE COURT: OKAY. THANK YOU. THANK YOU VERY MUCH.

05:03PM 1 MS. SAHARIA: THANK YOU.

05:03PM 2 YOUR HONOR, I CAN JUST REPORT TO THE COURT WITH RESPECT TO
05:03PM 3 THE VERY LAST MOTION FROM THE GOVERNMENT, WHICH WAS THE MOTION
05:03PM 4 TO COMPEL PRODUCTION OF RULE 26(2) MATERIAL THAT WE DID PRODUCE
05:03PM 5 THAT MATERIAL TO THE GOVERNMENT THIS MORNING.

05:03PM 6 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. I
05:03PM 7 NOTICED THAT THERE WASN'T ANY REAL REQUEST FOR AN ORDER. SO
05:03PM 8 THANK YOU. THANK YOU FOR THE UPDATE.

05:03PM 9 ANYTHING FURTHER ON ANY OF THESE MOTIONS THAT WE'VE
05:03PM 10 DISCUSSED?

05:03PM 11 MR. DOWNEY: YOUR HONOR, I HAVE A VERY MINOR
05:03PM 12 REQUEST.

05:03PM 13 THE COURT: YES.

05:03PM 14 MR. DOWNEY: I KNOW THE COURT IS GOING TO BE
05:03PM 15 SCHEDULING A DAUBERT HEARING IN CONNECTION WITH DR. MASTER.

05:03PM 16 I WONDER IF IN THAT ORDER THE COURT MIGHT REQUEST THAT ANY
05:04PM 17 SUPPLEMENTAL INFORMATION THAT DR. MASTER REVIEWS BE PROVIDED TO
05:04PM 18 US AT SOME DATE CERTAIN IN ADVANCE OF THAT HEARING, AND PERHAPS
05:04PM 19 REQUIRE WHATEVER THE SUPPLEMENT TO HIS REPORT BE, THAT IT ALSO
05:04PM 20 BE FILED WITH SOME REASONABLE TIME FOR US TO REVIEW IT.

05:04PM 21 THE COURT: ALL RIGHT. MR. LEACH.

05:04PM 22 MR. LEACH: I HAVE NO PROBLEM WITH THAT CONCEPT,
05:04PM 23 YOUR HONOR.

05:04PM 24 THE COURT: ALL RIGHT. THANK YOU.

05:04PM 25 I WAS THINKING ABOUT FOR A DAUBERT HEARING, JUST TIMING

05:04PM 1 WISE, I HAVE NOT REALLY REACHED A DATE YET, BUT DOES SOME TIME
05:04PM 2 IN JUNE SOUND GOOD? IS THAT TOO LATE? IS THAT TOO EARLY?

05:04PM 3 WHAT DO YOU THINK, MR. LEACH? IS JULY TOO LATE?

05:04PM 4 MR. LEACH: I DON'T THINK JULY IS TOO LATE,
05:04PM 5 YOUR HONOR. AND I NEED TO REPORT I HAVE -- GIVEN THE PACE OF
05:04PM 6 OUR OTHER RESPONSIBILITIES, I HAVE NOT HAD A CHANCE TO CONNECT
05:04PM 7 WITH THE EXPERT ABOUT HIS SCHEDULE. SO I DID HEAR THE COURT'S
05:04PM 8 COMMENT ABOUT DOING IT BEFORE THE PRETRIAL CONFERENCE, WHICH IS
05:05PM 9 IN JUNE. I THINK THAT'S -- WOULD PUT A LOT OF PRESSURE ON THE
05:05PM 10 PARTIES, BUT WE'LL DO WHATEVER THE COURT WISHES. I THINK JULY
05:05PM 11 WOULD BE PERFECTLY FINE.

05:05PM 12 THE COURT: OKAY.

05:05PM 13 MR. DOWNEY: I WILL LEAVE IT TO YOUR HONOR. OUR
05:05PM 14 PREFERENCE WOULD BE STRONGLY TO THE CONTRARY. I TAKE FROM THE
05:05PM 15 AMOUNT OF MATERIAL THAT WE HAVE TO DEAL WITH, WE WOULD BE
05:05PM 16 BETTER OFF TO KNOW WHAT IS GOING TO HAPPEN.

05:05PM 17 THE COURT: SURE.

05:05PM 18 MR. DOWNEY: AND WE'LL BE PREPARED TO DO IT AS SOON
05:05PM 19 AS THE COURT IS, AND WE HOPE THAT WILL BE SOON.

05:05PM 20 THE COURT: ALL RIGHT. THANK YOU. THANK YOU VERY
05:05PM 21 MUCH.

05:05PM 22 MR. LEACH: ALL RIGHT. THANK YOU.

05:05PM 23 THE COURT: ANYTHING FURTHER FROM ANYONE ON THE
05:05PM 24 TEAMS ABOUT ANYTHING BEFORE WE END THIS PUBLIC SESSION,
05:05PM 25 MR. SCHENK?

05:05PM 1 MR. SCHENK: NO, YOUR HONOR.

05:05PM 2 MS. SAHARIA: NO, YOUR HONOR.

05:05PM 3 THE COURT: ALL RIGHT. THANK YOU. LET'S END THIS
05:05PM 4 PUBLIC SESSION THEN.

05:05PM 5 THE MOTIONS THAT THE COURT HAS NOT RULED ON ARE INDICATED
05:05PM 6 DEFERRED. THE COURT WILL ISSUE AN ORDER ON THOSE. THEY ARE
05:05PM 7 UNDER SUBMISSION, AND THE COURT WILL ISSUE ORDERS CONCURRENT
05:05PM 8 WITH THE OTHER ORDERS THAT HAVE BEEN MADE ON THE RECORD. SO
05:05PM 9 THAT ENDS OUR SESSION NOW.

05:06PM 10 LET'S JUST TAKE A STANDING BREAK FOR A MINUTE WHILE
05:06PM 11 MS. KRATZMANN DOES WHAT SHE NEEDS TO DO.

05:06PM 12 THE CLERK: YES, YOUR HONOR.

05:06PM 13 **(SEALED PROCEEDINGS PAGES 152 - 161.)**

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

A handwritten signature in black ink that reads "Irene Rodriguez". The signature is written in a cursive, flowing style with a large, decorative flourish at the end of the last name.

IRENE RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

DATED: MAY 12, 2021